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Supreme Court, U.S.
FILED

No. _____

071235 MAR 27 2008

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In The

Supreme Court of the United States

ALAN KONIG,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA, LAWRENCE J. DAL CERRO, RUSSELL WEINER, ALLEN BLUMENTAL, AND ROBERT HAWLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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In Pro Per

QUESTIONS PRESENTED

1. Whether the grant of Eleventh Amendment immunity to the State Bar of California, a public corporation that receives no funding from the State of California, is not governed by any State laws or regulations applicable to State agencies, and from whose debts the State of California has intentionally insulated itself, was error when made without any supporting factual basis and in apparent conflict with numerous precedents of this Court?

2. Whether the decision below erred in granting summary judgment in favor of the Respondents by misapplying the summary judgment standard, impermissibly disregarding several misrepresentations and inconsistent statements made by Respondents, improperly disregarding critical evidence favorable to the Petitioner that established his prima facie case and undermined the Respondents' non-retaliatory explanations, improperly failing to draw all reasonable inferences in favor of the Petitioner, improperly weighing the evidence and making credibility determinations, impermissibly making express factual findings, and applying and requiring an incorrect lower standard of Respondents to address Petitioner's prima facie case?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the case.

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OPINIONS BELOW

The two-page unreported memorandum decision of the U.S. Court of Appeals for the Ninth Circuit that summarily affirmed the district court orders can be found at 2007 U.S. App. LEXIS 26401 and is reprinted in the Appendix to the Petition ("App.") at 1-2. The district court's September 16, 2004 unreported order granting Eleventh Amendment immunity can be found at 2004 U.S. Dist. LEXIS 19498 and is reprinted at App. 3-23 and, its October 11, 2005 unreported order granting summary judgment on the First Amendment cause of action can be found at 2005 U.S. Dist. LEXIS 24560 and is reprinted at App. 24-81.

JURISDICTION

The Ninth Circuit's decision was entered on November 8, 2007. A timely petition for rehearing was denied on December 28, 2007. App. 82-83. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal provisions involved are the First and Eleventh Amendment to the U.S. Constitution, and section 1983 of Title 42 of the U.S. Code.

The State provisions involved are article 12, section 3 of the California Constitution, section 6001, 6002, 6008.1, 6008.3, 6010, 6011, 6012.5, 6013.1, 6013.4, 6025, 6029, and 6030 of the California Business and Professions Code, section 900.2 through 900.6, 940.2 through 940.6, 955.4, 960.5, 965, 970, 970.2, 3501(c),

3512, 6585(f), 9149.20, 11340, 11340.1, 18500, 53227.2, 53820, 54706, and 68701 of the California Government Code, and section 1102.5 of the California Labor Code.

Due to the length of the provisions involved, they have been stated in the Appendix at 84-99.

STATEMENT OF THE CASE

Although, on first appearance, this case presented a relatively straight-forward application of legal principles in favor of Petitioner, the decisions below inexplicably either failed or refused to follow the well-established precedent of this Court and, instead, disregarded the precedent to reach conclusions that directly conflict with the precedents of this Court. A brief statement of the nature of the State Bar of California (Bar) and Petitioner's employment with it assists in highlighting the conflict.

A. The Origin and Nature of the Bar

The Bar is "an organization created under California law to regulate the State's legal profession." *Keller v. State Bar of California*, 496 U.S. 1, 4 (1990). It is a public corporation that: may sue and be sued; borrow money, issue bonds, and contract debts; own and manage real and personal property; construct and maintain buildings and other improvements to real property; transact in any real or personal property, including selling, leasing, and encumbering it; and, may raise revenue by any lawful means. Cal. Bus. & Prof. Code § 6001 (App. 85-86).

Pursuant to § 6001, it is not subject to any State legal provisions that apply to State agencies that govern the conduct of the agencies and place limitations on the actions that they may undertake:

> No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions [of various Government Code sections], shall be applicable to the State Bar, unless the Legislature expressly so declares.

It thus, for instance, is not a part of the State civil service and is not required to comply with the State Administrative Procedures Act. *See* Cal. Gov't Code § 18500, *et seq.* and § 11340, *et seq.* (App. 95-97).

It negotiates its employment contracts pursuant to the Meyers-Milias-Brown Act, which applies to local entities, rather than the Dill Act, which applies to State entities. *Id.* at § 3500, *et. seq.* and § 3512, *et seq.* (App. 93-94).

Its funding "comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors." *Keller*, 496 U.S. at 11. Additionally:

> Only lawyers admitted to practice in the State of California are members of the State Bar, and all. . .lawyers admitted to practice in the State must be members. [The Bar] undoubtedly performs important and valuable services for

> the State by way of governance of the profession, but those services are essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court. (Citations omitted.). *Id. See also* Cal. Bus. & Prof. Code § 6002 (App. 86).
>
> The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. *Keller*, 496 U.S. at 13.

The Bar's status as a public corporation means that it is not the State but rather a "local public entity" or "local agency" that is the equivalent of a county, city, or political subdivision and that is not entitled to have claims against it paid from State funds. Cal. Gov't Code §§ 900.4, 900.6, 940.4, 940.6, 970(c), 6585(f), 53227.2(a), 53820, & 54706 (App. 89-90, 92, 94, 97).

The State has expressly insulated itself against any debts or obligations of the Bar and permitted foreclosure to occur on the Bar's property. Cal. Bus. & Prof. Code § 6008.1 and § 6008.3 (App. 87).

Sixteen of the 22 members of the Bar's governing board are attorneys elected by its membership meaning that 72% of its governing board is never subject to review, scrutiny, or accountability from the public, any elected official, or any governmental agency. *Id.* at §§ 6010 through 6013.4 (App. 87-88). It performs its functions without any oversight or review by State entities. *Id.* at § 6025 and § 6030 (App. 88, 89).

Contrary to the representations made in the courts below by the Respondents, the Bar is within the judicial *article* of the State Constitution and not within the judicial *branch* of State government and no competent legal authority has ever stated it is a member of the judicial branch. *See Obrien v. Jones*, 23 Cal.4th 40, 48, 999 P.2d 95 (2000). Placement in the State constitution is essentially meaningless as it also provides for public utilities and subjects them to legislative oversight. Cal. Const. Art. 12, § 3 (App. 85). Contrasted with the Bar is the California Commission on Judicial Performance, which performs the equivalent functions of the Bar for the judiciary, that is expressly created as a member of the judicial branch. Cal. Gov't Code § 68701 (App. 98).

B. Petitioner's Employment History

Petitioner was admitted to practice law in California on December 2, 1994. From May 17, 1999 through October 2004, he was employed as a deputy trial counsel with the Bar in its Office of the Chief Trial Counsel (OCTC). Respondents Blumenthal, Dal Cerro, and Weiner were within his chain of command.

Respondent Hawley was not employed by OCTC, was not in Petitioner's chain of command, and was the Deputy Executive Director of the Bar responsible for oversight of human resources.

Prior to employment with the Bar, Petitioner was employed as a deputy district attorney for 18 months and honorably served as a naval officer and attorney in the Navy's Judge Advocate General's Corps (JAGC) for 3 ½ years during which time he was twice awarded the Navy-Marine Corps Achievement Medal (NAM), was twice named officer of the quarter, and received dozens of letters of commendation and appreciation from various commanding officers and commands for his legal work.[1]

Prior to his protected activity in 2003, Petitioner never received a performance evaluation at the Bar that had a performance rating of "needs improvement" in any individual or the overall category.[2]

In his July 2001 through July 2002 evaluation, the last before his protected activities, Petitioner was rated as "exceeds requirements," the highest rating possible, in 5 individual categories and the overall category.[3]

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[1]Excerpts of the Record ("ER"), 2058-2060.
[2]*Id.* at 0680.
[3]*Id.* at 1433-1444.

In December 2002, the Chief Trial Counsel (CTC), the head of Petitioner's office, recognized Petitioner as the 2002 "most valuable attorney" in the office.[4]

One of Petitioner's cases at the Bar, involving the largest misappropriation matter in the Bar's history, garnered an unusually high level of positive media coverage that included numerous stories on each of the local broadcast network station's nightly news casts, a front-page story in the August 3, 2003 Sunday edition of the *San Francisco Chronicle*, and a feature article in the January/February 2004 edition of *Legal Affairs*, a magazine associated with Yale Law School.[5]

On July 16, 2003, the CTC stated that Petitioner was "a shining example of outstanding public protection," was the "BEST," that "the world [was] a better place because of [Petitioner's] dedication and efforts," and that "[i]t was [his] honor to be associated with [Petitioner]."[6]

On August 4, 2003, the *California Bar Journal's* editor stated that Petitioner's work "makes the bar look good." Respondent Dal Cerro added his own compliments to the statement and forwarded them to Los Angeles OCTC management.[7]

Prior to November 2003, Petitioner was never subjected to disciplinary action and, prior to

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[4] *Id.* at 0680.
[5] *Id.* at 0487, 0680, 1140, 1395-1423, 1705-1710.
[6] *Id.* at 1425, 2061.
[7] *Id.* at 1427. *See also* 2083-2085, 1340-1364.

September 23, 2003, he was not criticized or counseled by any supervisor.[8]

Beginning in spring 2003, Petitioner expressed concerns about the actions of the State Bar Court that included violations of the Bar's due process, violation of a witness' State constitutional right to medical privacy, *ex parte* communications, prejudicial rulings and comments, disrespectful and rude behavior directed toward parties, counsel, and witnesses, and a lack of judicial decorum and professionalism.[9]

Petitioner informed his supervisors that he would report the misconduct to the California Commission on Judicial Performance (CJP) because of the lack of response to his concerns.[10]

On September 11, 2003, Petitioner gave to Respondent Dal Cerro a memorandum that again raised the issues of judicial misconduct, the lack of response to them, and several instances of Dal Cerro's malfeasance.[11]

On November 3, 2003, Petitioner submitted a formal complaint to the CJP about misconduct by the court.[12]

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[8] *Id.* at 0680.
[9] *Id.* at 0488-0489, 2061-2064, 2086-2099, 2162-2184, 1291-1306.
[10] *Id.* at 0058, 0489.
[11] *Id.* at 0489, 0512-0519, 2064-2065, 2231-2248.
[12] *Id.* at 0491.

On November 18, 2003, Petitioner sent a memorandum to the CTC, human resources, and Respondents advising them of retaliation against him because of his report to the CJP. He received no response.[13]

Thereafter, on November 26, 2003, Petitioner made an external complaint of retaliation and other unlawful activity at the Bar to the Senate and Assembly Judiciary Committees of the California legislature, which have oversight of Petitioner's office, pursuant to California Government Code § 9149.20, *et seq.* and California Labor Code § 1102.5, *et seq.* On February 26, 2004 and April 9, 2004, he submitted supplements to the November 26 report. Respondent Hawley had knowledge of each at the time they were made and informed the other Respondents of them.[14]

On December 4, 2003, Respondent Dal Cerro directed Petitioner to file charges that lacked probable cause against an attorney. When Petitioner declined, he was given a written reprimand.[15]

On December 8, 2003, Petitioner made a complaint of retaliation to the State Personnel Board but later learned that it had no jurisdiction over the Bar because it did not consider the Bar to be a State agency. Respondent Hawley learned of this complaint

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[13] *Id.*, 0524-0537.
[14] *Id.* at 0496, 0649, 1129-1731, 1735-1958, 2407.
[15] *Id.* at 1512-1513, 1530-1549, 1597-1598.

when it was filed and advised Respondent Dal Cerro of it at the same time.[16]

Beginning in December 2003/January 2004, Respondent Dal Cerro began efforts to discover any evidence that would support allegations of misconduct against Petitioner.[17]

From March 25 through April 2004, Petitioner was directed to disregard and violate the requirements of the Bar's rules of procedure regarding probable cause to initiate disciplinary proceedings and told to follow inconsistent and contradictory office standards. When he declined, Respondents threatened him with disciplinary action, subjected him to adverse action, and eventually suspended him.[18]

On April 2, 2004, Respondents directed Petitioner to file disciplinary charges against an attorney that lacked a factual and legal basis and Petitioner declined. He was subjected to adverse action for this.[19]

From May 18 through May 21, 2004, Respondents directed Petitioner to file disciplinary charges that lacked probable cause against another attorney. When Petitioner declined, he was subjected to adverse and disciplinary action including suspension.[20]

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[16] *Id.* at 0649.
[17] *Id.* at 2082, 2537-2538.
[18] *Id.* at 0705, 0911-0913, 0983-0986, 0989.
[19] *Id.* at 0921-0922, 1742-1743, 1925-1938, 1940-1954, 2069.
[20] *Id.* at 1031-1033, 2068-2069.

From September 2003 through September 2004, Respondents subjected Petitioner to an unprecedented series of adverse actions including: false accusations of misconduct; interference with his job performance and ability to litigate matters; false written reprimands; false performance evaluations; reassignment to a new position; placement on an alleged performance improvement plan; removal from litigation matters; reassignment of his cases; unjust and unfounded criticisms, judgments, and harassment; exclusion from meetings he was normally expected to attend; an unwarranted and false suspension; being subjected to an investigation that was falsely represented as an investigation of his complaints but that was conducted by an attorney who was a partner in a law firm specializing in representation of employers in labor disputes and litigation and who was also a friend, former colleague, and counsel for Respondent Hawley; denial of his remote access to his electronic mail account; a lock out from his office and the building; a deprivation of his vacation leave balance due to Respondent Dal Cerro's submission of a fraudulent time card to payroll; and, a false accusation of misconduct against him while he was on medical leave due to the Respondents' harassment and retaliation against him.[21]

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[21] *Id.* at 0490-0491, 0496-0509, 0520-0521, 0538-0540, 0543-0547, 0571-0608, 0612-0621, 0643-0648, 0671, 0698, 0704-0905, 0911-0913, 0983-0986, 1091-1094, 1112-1118, 1130-1131,1138-1143, 1146-1150, 1168, 1172-1173, 1175-1226, 1526-1528, 1737-1742, 1765-1774, 1878-1979, 1883-1902, 1940, 2070-2073, 2078, 2080-2082, 2352-2425, 2496-2521, 2531-2536.

In October 2004, Petitioner involuntarily resigned his position from the Bar after reading, during discovery in the district court proceeding, an e-mail written by the CTC to one of the CTC's assistants that stated it was his intent to terminate Petitioner (even though no legitimate basis existed for such an employment action).[22]

C. Proceedings in the District Court

On June 4, 2004, Petitioner initiated this action in the district court. Jurisdiction of the court was proper pursuant to 28 U.S.C. §§ 1331 and 1367. The first amended complaint served as the initial operative complaint and alleged: (1) retaliation in violation of California Labor Code § 1102.5, *et seq.*; (2) retaliation in violation of California Government Code § 9149.20, *et seq.*; (3) a claim pursuant to the California Supreme Court's decision in *Tameny v. Atlantic Richfield Co.*; (4) violation of the First Amendment (42 U.S.C. § 1983); and (5) violation of the Fourteenth Amendment (42 U.S.C. § 1983).

On September 16, 2004, the court entered its order granting, in part, Respondents' motion to dismiss based on Eleventh Amendment immunity.

Thereafter, a second amended complaint was filed against the Respondents in their individual capacities alleging violation of the First and Fourteenth Amendment.

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[22] *Id.* at 0510-0511, 0700, 1110.

On April 6, 2005, the court entered its order dismissing the Fourteenth Amendment cause of action.[23]

On October 17, 2005, the court entered its order granting the Respondents' summary judgment motion on the First Amendment cause of action along with a final judgment.

D. Proceedings in the Ninth Circuit

The Ninth Circuit summarily affirmed the district court's orders in a memorandum opinion without substantive comment or any analysis.

REASONS FOR GRANTING THE WRIT

This matter presents one of those rare, albeit recurring within the Ninth Circuit,[24] situations where a decision of lower federal courts flies in the face of this Court's precedents even after one party has expressly stated to the lower courts that this Court's precedents dictate a result contrary to that being reached by them. Rather than attempt to distinguish this Court's precedents or otherwise explain the decision in light of the precedents, the lower courts in

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[23]This order is not included as part of this Petition.

[24]*See, e.g., United States v. Nachtigal*, 507 U.S. 1, 2-6 (1993) (per curiam) (it was incumbent upon the Ninth Circuit to follow intervening and controlling Supreme Court precedent even though Ninth Circuit precedent had not been expressly overruled).

this matter simply chose to ignore them and disregard their holdings.

Additionally, the lower courts failed or refused to provide any factual basis for the improper rulings, and, at the appellate level, issued a summary disposition that stated nothing of substance after determining that oral argument was not necessary.

Perhaps most disconcerting about the lower courts' actions is that one of the unsupported holdings involved a Constitutional issue of significant importance and the holding is not only contrary to this Court's precedents but it also unjustifiably extended Eleventh Amendment immunity to an entity with which the State of California never intended to share its sovereignty. This is as much an affront to the State of California as it is to Petitioner.

The grant of immunity constituted the type of unwarranted expansion of the reach of the Eleventh Amendment that this Court has previously warned against[25] and the decision has far reaching implications beyond the impact on Petitioner. On at least 16 occasions known to Petitioner, the Ninth Circuit and the federal district courts within California have, in the past, deprived parties of their right to

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[25] *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 401 (1979) ("Unless there is good reason to believe that [a State] structured th new agency to enable it to enjoy the special constitutional protection of the [State itself]. . .there would appear to be no justification for reading additional meaning into the limited language of the Amendment.").

proceed in federal court against the Bar based on the unsupported and incorrect determination that the Bar shares the State's immunity under the Eleventh Amendment. Additionally, on at least four occasions subsequent to this matter these same courts continue to do so, long after the erroneous nature of granting Eleventh Amendment immunity to the Bar was raised by Petitioner.[26] One decision, in fact, expressly relies upon and cites to the unpublished decision in this matter to support its dismissal of the plaintiff's action against the Bar based on the erroneous conclusion that the Bar is immune from suit. *See Khanna v. State Bar of California*, 505 F.Supp.2d 633, 644 (N.D. Cal. 2007).

The significance of applying Eleventh Amendment immunity in a matter and its resulting impact has been succinctly stated by Justice Stevens:

> This Court's expansive Eleventh Amendment jurisprudence is not merely misguided as a matter of constitutional law; it is also an engine of injustice. The doctrine of sovereign immunity has long been the subject of scholarly criticism. (Footnote omitted.). And rightly so, for throughout the doctrine's history, it has clashed with the just principle that there should be a remedy for every wrong. (Citation omitted.). Sovereign immunity inevitably places a lesser value on administering justice to the individual than on giving government a license to act arbitrarily.

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[26]A list of all the cases is provided at App 100-101.

> Arising as it did from the peculiarities of political life in feudal England, 1 F. Pollock & F. Maitland, History of English Law 515-518 (2d ed. 1909), sovereign immunity is a doctrine better suited to a divinely ordained monarchy than to our democracy. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 54 (1994) (STEVENS, J., concurring).

The disregard of this Court's precedents, issuance of decisions that are directly in conflict with this Court's precedents, refusal to provide any facts (or providing facts that are refuted and contradicted by the non-moving party) in support of the decisions, and refusal to correctly apply the law and principles established by this Court presents a threat to the orderly administration of justice and increases the public's already diminished trust in the judicial process and its faith in the courts' ability to fairly and correctly apply the law and determine legal matters. The public's distrust is only heightened when the disregard of the law favors an entity such as the Bar as it reasonably appears to the public that the courts are protecting their own.

I. THE GRANT OF ELEVENTH AMENDMENT IMMUNITY TO THE BAR LACKED ANY FACTUAL BASIS AND WAS CONTRARY TO AND IN CONFLICT WITH NUMEROUS PRECEDENTS OF THIS COURT

A. The Lack of Any Factual Basis

In the only detailed Eleventh Amendment order in this matter, the district court's decision does not state upon what factual determinations the immunity was premised. It made no determination regarding the source of the Bar's funding, whether any judgment against the Bar would be paid by the State, the autonomy of the Bar, or any other relevant factual determination that is necessary for a proper finding of whether an entity can claim immunity pursuant to the concepts of "arm of" the State or "alter ego" of the State. App. 7-10. *See, e.g., Lake Country Estates*, 440 U.S. at 401-02 (discussing several necessary and specific factual determinations).[27]

In affirming the district court order, the Ninth Circuit, rather than correcting the error by the district court and remanding for factual findings or making factual findings itself based on the federal and State statutory and case law that Petitioner provided in his briefing, declared that the matter was suitable for decision without the need for oral argument and that it had "carefully considered the three very thorough memorandum opinions of the district court [and] the appellate briefs of the parties." App. 2.

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[27]Notably, despite, or in spite of, its recognition of the obligatory nature of making findings, its express acknowledgment that the precedent upon which it was relying never made the required findings, and its express acknowledgment that it was unclear whether the Bar would be entitled to immunity if the findings were made, the decision nonetheless disregarded the obligation to make findings and simply stated that Petitioner's position that such findings need to be made was "interesting." App. 8-10.

The reliance upon the prior Ninth Circuit decisions of *Lupert v. State Bar*, 761 F.2d 1325 (9th Cir. 1985) and *Hirsh v. Justices of the Supreme Court*, 67 F.3d 708 (9th Cir. 1995) is equally unhelpful to support the immunity determination because neither of the decisions made the necessary factual determinations.

Moreover, both decisions predate several of this Court's Eleventh Amendment decisions in which the impact on a State's treasury was emphasized to be the controlling factual determination.

Not only did the courts below fail in the obligations to make necessary findings to support the grant of immunity, they also necessarily disregarded this Court's factual determinations made in *Keller* that are extremely relevant to determining whether the Bar shares in the State's immunity.

B. The Grant of Immunity Conflicts with Numerous Decisions of this Court

One need not rely upon factual determinations from the lower courts in order to reach a proper conclusion that the Bar is not entitled to immunity and the decision below is contrary to and in conflict with this Court's well-established Eleventh Amendment jurisprudence. When this Court's precedents are applied to the undisputed and irrefutable facts, the only conclusion that can be made is that the Bar is not entitled to Eleventh Amendment immunity.

However, one need not necessarily rely upon the application of Eleventh Amendment precedent given

the existence of *Keller*. In *Keller*, this Court explicitly held:

> Of course the Supreme Court of California is the final authority on the "governmental" status of the State Bar of California for purposes of state law. *But its determination that respondent is a "government agency,"* and therefore entitled to the treatment accorded a governor, a mayor or a State Tax commission, for instance, *is not binding on us when such a determination is essential to the decision of a federal question. The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies."* 496 U.S. at 11 (emphasis added).
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> But the very specialized characteristics of the State Bar of California discussed above served to distinguish it from the role of the typical government official or agency. *Id.* at 12.
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> * * * * * * * * * * *
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> We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent's argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees. *Id.* at 13-14.

If the holding of *Keller* does not conclusively establish that the Bar is not an arm of the State entitled to benefit from the State's immunity, then this Court's holdings in its Eleventh Amendment decisions certainly provide the necessary conclusiveness.

As early as 1890, in *Lincoln County v. Luning*, 133 U.S. 529, 532-33 (1890), immunity was denied to a county because it exercised powers that defined its distinct status as a corporation and the State of Nevada would not be responsible for its debt. Notably, the county did receive funding from Nevada. *Id.*

In *Hopkins v. Clemson Agric. College*, 221 U.S. 636, 648 (1911), immunity was denied to a college because of its ability to make contracts, sue and be sued, buy and hold property, and accept gifts in its own name. Additionally, and, perhaps most important, it was noted that the State denied the college the ability to incur obligations on behalf of the State. *Id.* at 639-40. In other words, the State insulated itself from the debts and liabilities of the college.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977), immunity was denied to a school district because it more closely resembled a political subdivision due to its ability to make resource allocations, to sue and be sued, and to issue bonds and levy taxes. Again, the school district received significant financial support directly from the State. *Id.*

In *Lake Country Estates*, a matter involving an entity created by compact between California and

Nevada, the Court reemphasized that it "has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" 440 U.S. at 401. The Court also focused on the fact that each State had insulated itself from the debts of the entity and the entity's authority to make rules within its jurisdiction was not subject to veto at the State level. *Id.* at 402.

Hess involved another bi-state entity and provided one of the Court's most comprehensive decisions regarding Eleventh Amendment immunity. After discussing and analyzing numerous qualities and attributes of the entity, the Court simplified the immunity determination when it stated:

> Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury. (Citation omitted). Accordingly, Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations. 513 U.S. at 48.
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> * * * * * * * * * *
>
> If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" – both

> legally and practically – then the Eleventh Amendment's core concern is not implicated.
>
> The conflict between the Second and Third Circuits, it bears emphasis, is no longer over the correct legal theory. Both Circuits, in accord with the prevailing view. . .identify "the 'state treasury' criterion – whether any judgment must be satisfied out of the state treasury – as the most important consideration." *Id.* at 51.

The importance of whether the State would ultimately be responsible for any monetary judgment against the entity asserting entitlement to Eleventh Amendment immunity was reaffirmed in *Regents of the University of California v. Doe*, 519 U.S. 425, 430 (1997) and in *Auer v. Robbins*, 519 U.S. 452, 456 fn.1 (1997).

Recently, in *Northern Insurance Company of New York v. Chatham County*, 547 U.S. 189 (2006), this Court also reaffirmed the impropriety of granting Eleventh Amendment immunity to inferior governmental bodies such as counties, cities, districts, and political subdivisions.

As the precedents of this Court make clear, the Bar is not entitled to Eleventh Amendment immunity and the determination to provide such immunity to it in this matter is in direct conflict with the precedents.

There is no legal or practical distinction between the nature and status of the Bar and that of the entities found not entitled to immunity in *Lincoln*

County, Hopkins, Mt. Healthy, Lake Country Estates, and *Hess*. Like the entities in those matters, the Bar exercises powers and takes actions independently of the State, including: it may sue and be sued; borrow money, issue bonds, and contract debts; own and manage real and personal property; construct and maintain buildings and other improvements to real property; transact in any real or personal property, including selling, leasing, and encumbering it; and, may raise revenue by any lawful means. App. 85-86.

More importantly, the State of California has knowingly and intentionally determined to classify and treat the Bar as a local agency or entity that is the equivalent of a city, county, or other political subdivision, and not as a State agency or arm of the State. This is best highlighted by its determination, pursuant to § 6001 of the Business and Professions Code, to explicitly state that the Bar is not governed by the laws and regulations that govern all State agencies. Additionally, its classification as a public corporation unequivocally means, pursuant to California law, that it is not a State agency or a part of the State. *See* Gov't Code §§ 900.4, 900.6, 940.4, 940.6, 970, 3501(c), 3512, 6585(f), 53227.2, 53820, and 54706 (App. 89-90, 92-94, 97).

Any contention that the Bar is entitled to immunity because it is an administrative arm of the California Supreme Court is misplaced and unpersuasive. The California Supreme Court has never stated that the Bar is its administrative arm for all purposes but, instead, has been careful to note that it acts as such solely "in matters of admission and discipline of

attorneys." *In re Rose*, 22 Cal.4th 430, 438, 457, 993 P.2d 956 (2000). Additionally, the court has candidly acknowledged that its oversight of the Bar is practically nonexistent. *Id.* at 466 (Brown, J., dissenting); *In re Attorney Discipline System*, 19 Cal.4th 582, 610-12, 967 P.2d 49 (1998).

Finding that the Bar is not entitled to immunity would be consistent with this Court's determinations in related contexts. For instance, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), it was determined that a county was a citizen of a State and not the State itself for purposes of diversity jurisdiction. In reaching the conclusion, the Court stated:

> Most notably, under California law a county is given "corporate powers" and is designated a "body corporate and politic." In this capacity, a county may sue and be sued, and, significantly for purposes of suit, it is deemed to be a "local public entity" in contrast to the State and state agencies. In addition, the county, and from all that appears the county alone, is liable for all judgments against it and is authorized to levy taxes to pay such judgments. A California county may also sell, hold, or otherwise deal in property, and it may contract for the construction and repairs of structures. The counties also are authorized to provide a variety of public services such as water service, flood control, rubbish disposal, and harbor and airport facilities. Financially, the counties are empowered to issue general obligation bonds payable from county taxes. Such bonds create

> no obligation on the part of the State, except that the State is authorized to intervene and to impose county taxes to protect the bondholders if the county fails to fulfill its obligations voluntarily. In sum, these provisions strike us as persuasive indicia of the independent status occupied by California counties relative to the State of California. *Id.* at 719-20 (footnotes omitted).

A more precise summation of the characteristics and powers of the Bar could not be written than that which was written for the county in *Moor*.

In addition to those characteristics already stated, it is noted that California law mandates that the State Attorney General defend all state agencies in claims and litigation matters. *See* Gov't Code §§ 955.4, 960.5, and 965 (App. 90-91). The Attorney General has not made an appearance in this matter or participated in it in any way.

Additionally, and most importantly, granting immunity to the Bar is entirely inconsistent and in conflict with *Hess*, *Regents*, and *Auer* and their immunity determination based on the potential liability of the State for the debt of the entity involved.

Here, there is no dispute, nor can there be, that the Bar receives no State funding and the State would never, under any circumstances, be ultimately responsible for a judgment or debt of the Bar. Bus. & Prof. Code § 6008.1(a) (App. 87). The State took affirmative steps to expressly insulate itself from the

debts and liabilities of the Bar. This compels the determination that the Bar is not entitled to immunity.

Finally, as a matter of equity and fairness, the decision below cries out for reversal by this Court. What the decision has done, in essence, is create a governmental entity that is untouchable by either State or federal law since, pursuant to § 6001 of the Business and Professions Code, the Bar enjoys the benefit of not being the State and so being freed from the regulations that constrain State agencies while also, because of the grant of immunity by the lower courts, of being the State and so being immune from suit in federal court. Such gamesmanship by a governmental entity should never be condoned by any court.

II. THE DECISION TO GRANT SUMMARY JUDGMENT MISAPPLIED THE WELL-ESTABLISHED STANDARDS AND APPLIED INCORRECT LEGAL STANDARDS CONTRARY TO THIS COURT'S PRECEDENTS

A. The Decision in Light of the Requirements of *Reeves*

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000), this Court reemphasized the well-established principles that the courts are to follow in determining summary judgment:

> . . .the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. (Citations omitted.). . . . [A court]. . .must disregard all evidence favorable to the moving party that the jury is not required to believe. (Citation omitted.). That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses" (Citation omitted.)

Despite the above admonishment, there is a disturbing disregard of Petitioner's evidence, a willingness to accept all of Respondents' evidence, and a failure or refusal to resolve all reasonable inferences in Petitioner's favor throughout the decision grating summary judgment in this matter.

The failure to apply the proper summary judgment standard is evident in the content of the decision itself. In the "Factual Background" section, it cites to the Respondents' moving papers and supporting documents 39 times while citing to Petitioner's documents a grand total of four times. On 12 separate occasions, the section begins an alleged statement of fact with words to the effect of "According to Defendants," "Defendants contend," and, perhaps most egregious, "as described by Defendants." By the same token, the section prefaces every factual assertion by Petitioner with words such as "Plaintiff claims" or "Plaintiff alleges."

On every page of the alleged factual background section, the decision exhibits a disturbing willingness to incorrectly cite the evidence, all to the benefit of the Respondents.

For instance, the decision characterizes Petitioner as unreasonable and irrational because he sought review of a decision that disbarred an attorney. App. 26-27. The decision entirely failed to provide the complete facts and the reasons that Petitioner sought review of the disbarment decision, including: it failed to include a requirement that the attorney provide restitution to two clients in the amount of $9,500.00; it failed to include a requirement that the attorney pay court ordered sanctions; it failed to find harm caused to an 82-year old woman who was harassed by the attorney simply because she was the mother of a former business partner with whom he had a dispute; and, because the attorney's burden in seeking reinstatement to practice was significantly lowered by the court failing to find culpability on several charges.[26]

In another instance, the decision incorrectly represented the content of a memorandum written by Petitioner. The decision excerpted the content of a memorandum regarding Petitioner's conversation with a judge and then portrayed Petitioner's conversation as defiant and disrespectful based on the content of the memorandum. App. 38. However, the excerpt of the memorandum provided in the decision left out the most critical and important parts of the memorandum

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[26]ER 2082, 2522-2530.

– that the judge apologized for her conduct, acknowledged that her conduct was improper, and that Petitioner thanked her for the apology. This information was found in the sentences immediately preceding the excerpt and the sentence immediately following the excerpt. The sentences preceding the excerpt stated:

> While waiting at the entrance to the conference room for Blumenthal, Judge McElroy approached me and said she was sorry for the comments and that she should not have said what she did. She stated she understands that our jobs are sometimes difficult and the pressures associated with them.[29]

The concluding sentence to the excerpt that the decision excluded stated: "She again apologized and I thanked her for the apology."[30] It is difficult to understand or explain the manipulation of a document in this fashion.

Without explanation, the decision improperly excluded two incidents of clearly protected activity from its retaliation analysis – Petitioner's reports of February 26 and April 9, 2004. App. 48. The decision's retaliation analysis is, thus, flawed given the exclusion of the protected activity.

The decision's statement of alleged facts regarding the removal of Petitioner from the Stevens' matter

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[29]Supplemental Excerpts of Record ("SER") 0292.
[30]*Id.*

entirely disregarded Petitioner's evidence and was entirely based on Respondents' asserted (and untrue) version of events. App. 39-40. In his opposition to the summary judgment motion, Petitioner explicitly advised the court that Respondents' account of the Stevens' matter was untruthful and he submitted documentation corroborating that it was untruthful.[31] Not a single reference to Petitioner's evidence is stated anywhere in the decision.

Perhaps most disturbing is the decision's unsupported conclusions that Petitioner was insubordinate and refused to follow directives. App. 33, 36-38, 54. Despite taking great care to inform the court that in each instance Petitioner was declining to follow Respondents' directives to file charges that lacked probable cause against attorneys and directives to disregard the rules of procedure,[32] the decision entirely disregarded or ignored Petitioner's evidence and, inexplicably, improperly concluded that Respondents' directives involved nothing more than "dropping certain charges" or "making routine edits." App. 54. It is difficult to comprehend how directives to file charges lacking in probable cause and to disregard the rules of procedure can be equated to simple editing.

The improper characterization of Petitioner's opposition to Respondents' unlawful directives necessarily also impacted the retaliation analysis since each instance of opposition was a protected activity

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[31]ER, 2080-2082.

[32]*Id.* at 2068-2069, 1512-1513, 1530-1549, 0983-0986, 1925-1938, 1940-1954, 1742-1743, 1031-1033, 0921-0922.

and Respondents disciplined Petitioner for the protected activity.

The decision's conclusion that Respondents provided non-retaliatory justifications for their adverse actions[33] failed to properly follow legal standards since at no time did Respondents provide *any* reason for several of the adverse actions, including: Respondent Hawley sending a harassing letter to Petitioner falsely accusing him of misconduct while he was at home on medical leave because of earlier harassment,[34] disabling his remote access to his e-mail account and never restoring it,[35] and locking him out of the building and his office and never restoring his access;[36] Respondent Dal Cerro submitting a fraudulent time card to payroll resulting in the deprivation of 13.42 hours of Petitioner's earned vacation leave;[37] and, Respondents Dal Cerro and Weiner preventing Petitioner from attending an attorneys meeting to discuss one of his litigation matters and then reassigning it without ever discussing it with him.[38]

The decision acknowledged that Petitioner's evidence of Respondent Dal Cerro's expressed opposition to his protected activity of reporting judicial misconduct would suffice to establish a prima facie case but it then, inexplicably, incorrectly asserted that

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[33]App. 67-68, 73-80.

[34]*Id.* at 0508, 0503-0504, 0643-0648.

[35]*Id.* at 0508.

[36]*Id.*, 0671.

[37]*Id.* at 0509, 1112-1118.

[38]*Id.* at 1142-1143, 1446-1450, 1526-1528, 1995 fn.5.

Petitioner did not provide evidence of the expressed opposition when, in fact, he did. App. 70 fn.17. The evidence of expressed opposition is exactly as Petitioner stated. ("Every time you consider making an accusation against a judge. . .for events occurring within the State Bar system, you must first consult with Don [Petitioner's then supervisor].").[39]

The decision's determination that another instance of expressed opposition was an unreasonable reading of a document by Petitioner was a clear impermissible determination based on the weighing of evidence and/or credibility. App. 71-72. There is nothing ambiguous about the broad directive that Petitioner seek the approval of his team leader prior to sending any documents related to his cases to individuals outside of the office. The directive necessarily included complaints and reports to the CJP about judicial misconduct and no jury would be unreasonable in interpreting the document in this fashion (Petitioner would have no other reason to communicate with the CJP).

That Petitioner's complaint to the CJP was of great concern was also supported by other evidence that was disregarded in the decision. Petitioner's former supervisor, Andrea Wachter, expressly testified that Respondent Dal Cerro was constantly concerned with his relationship with the court, that he would ask the attorneys in the office to simply comply with court actions that were inconsistent with the law and facts in order to appease the court, that he would rather

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[39]ER 2342 (81:10-25).

appease the court than support the attorneys in the office, that when she complained to him about the court he was more concerned with keeping the court happy, and that he would support the court rather than Petitioner when she would discuss with him some of the court's issues.[40] Additionally, she provided additional testimony that was disregarded that established the falsity of the content of the performance evaluation provided to Petitioner.[41]

The decision's assertion that Petitioner did not provide sufficient evidence of pretext[42] is the most troubling of all of its incorrect assertions in that it advanced arguments Petitioner never made and it ignored or disregarded overwhelming evidence of pretext that Petitioner did provide.

Initially, the decision prevented Petitioner from establishing pretext based on his strong work history (detailed previously herein) that preceded his protected activity and the adverse actions since it entirely ignored the evidence of it that Petitioner provided and made no reference to it at all.

The decision's findings regarding Petitioner's stated intent to comply with the rules of procedure (charging standard enacted by the State Bar Board of Governors) and Respondents' adverse actions in response[43] stated nothing about the overwhelming

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[40] *Id.* at 2549-2567.
[41] *Id.* at 2552, 2554-2555, 2563, 2565-2566.
[42] App. 76-80.
[43] App. 36, 75, 78-79.

evidence of pretext provided by Petitioner, including: Respondent Dal Cerro twice argued to the Bar's appellate court that the standard was exactly as Petitioner stated;[44] Respondent Blumenthal, at his deposition, agreed that the standard Petitioner was following was correct which entirely contradicted the allegations he had earlier made against Petitioner;[45] and, another senior trial counsel also utilized the same standard as Petitioner and stated that all other attorneys in the office did as well.[46]

The alleged performance improvement plan (PIP) imposed against Petitioner was entirely pretext given a determination was made to issue it to him even before the alleged bases for it occurred[47] and one of the stated bases, lack of productivity, was completely contrived since no productivity standards every existed or were told to Petitioner.[48] Additionally, Petitioner disputed and refuted each of the assertions stated in the PIP.[49] Likewise, Respondents determined to reassign the Stevens matter from Petitioner before the alleged bases for the reassignment had occurred.[50]

Notwithstanding that it was a full year after the fact, Respondents' alleged criticisms of Petitioner for his work in the Bajaj matter were clear pretext given

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[44]Addendum to Appellant's Opening Brief, Tab 7 & 10.
[45]ER 2283 (27:2-22).
[46]*Id.* at 2273-2281.
[47]*Id.* at 0506, 0628, 653.
[48]*Id.* at 0698, 0909, 0922-0925.
[49]*Id.* at 0698, 0906-1099.
[50]*Id.* at 0508-0509, 1111.

the very work was approved and authorized by Respondents Dal Cerro and Weiner a year earlier.[51]

There were also numerous instances of inconsistent and contradictory statements as well as misrepresentations to the court that supported a finding of pretext and prevented a grant of summary judgment. The decision disregarded or ignored all of them.

Again, from *Reeves*:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. (Citation omitted). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." (Citations omitted.). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. (Citation

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[51]App. 28 fn.1, 75; ER 0705, 0827-0858, 0914-0921, 2062-2064, 2086-2184.

> omitted.). . .Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. 530 U.S. at 147-148.

When stating his reasons for reassignment of the Kay/Dalton matter, Respondent Dal Cerro asserted to the court that in late 2003 he became concerned that "[Petitioner] was too personally involved" in the matter, especially with respect to an alleged "relationship" with the complaining judge, and that he had lost objectivity in the matter.[52] He never expressed this to Petitioner and it is inconsistent with what was stated to Petitioner at the time of the reassignment.[53]

Respondent Dal Cerro told Petitioner that he was being reassigned because of an alleged "rotation" system.[54] He said nothing about a rotation system in his explanation of the reassignment to the court.[55]

When Petitioner informed Respondent Dal Cerro that he was prevented from attending the attorneys meeting to discuss his litigation matter, Dal Cerro responded by feigning ignorance: "Alan, why weren't you there? A calendar conflict? ('Prevent' seems like such a strong word. . .)."[56] Months later, he admitted

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[52]ER 1962.
[53]*Id.* at 1168, 2074-2075; SER 0235, 0237, 0239, 0241.
[54]*Id.* at 2082, 2531-2536.
[55]*Id.* at 1964.
[56]*Id.* at 1526-1528.

to a third party that Petitioner's exclusion was preplanned, intentional, and that he was an active participant in it.[57]

Respondent Hawley represented to Petitioner's union that his reports to the legislature "have not been treated as a personnel matter"[58] which contradicted the "personnel" characterization of them he made to the Board of Governors and to the legislature.[59]

Respondent Dal Cerro misrepresented to the court that he had no knowledge of Petitioner's report to the State Personnel Board.[60] On three separate occasions, he learned of the report.[61]

Respondents Hawley and Weiner misrepresented to the court that they had no knowledge of Petitioner's CJP complaint until he disclosed it in "this lawsuit."[62] They did not deny possessing and reading Petitioner's November 26 report[63] and Hawley actually referenced it on numerous occasions.[64] The report specifically referred to the CJP complaint on numerous occasions:

> . . .my repeated statements of intent to notify another governmental agency of *judicial*

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[57] *Id.* at 1995 fn.5.
[58] *Id.* at 0624-0625.
[59] *Id.* at 0571-0574.
[60] *Id.* at 1967.
[61] *Id.* at 0549, 0649, 2068.
[62] *Id.* at 1967, 1981.
[63] *Id.* at 1976, 1980-1981.
[64] *See, e.g., Id.* at 0571-0574.

> misconduct within the State Bar if Mr. Dal Cerro failed to acknowledge and address the misconduct. *Such complaint to another governmental agency was in fact made by me on November 3, 2003.*[65]
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> * * * * * * * * * * *
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> . . .on November 3, 2003, *I filed with a state agency a complaint stating numerous unethical and unlawful acts committed by a judge within the State Bar. . . .*[66]

Respondent Hawley's friend, former coworker, and hired gun, Addington, misrepresented to the court that a State Bar committee retained her[67] when, in fact, Hawley retained her.[68]

It is one thing for a party to misrepresent matters to a court and quite another thing for a party to be rewarded with a favorable judgment for misrepresenting matters to a court.

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[65] *Id.* at 1130 (emphasis added).
[66] *Id.* at 1131 (emphasis added).
[67] *Id.* at 1983.
[68] *Id.* at 0498-0503.

B. Contrary to This Court's Precedents, the Decision Applied an Incorrect Standard, Impermissibly Lowered Respondents' Burden, and Improperly Reached Factual Determinations

In finding that the Respondents provided legitimate non-retaliatory justifications for each of the adverse actions taken against Petitioner, the decision applied an incorrect legal standard and improperly accepted justifications that could not legally be justifications.

This Court has stated that an employer may not "prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (*quoted approvingly by McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360 (1995)).

As a matter of law, it was impossible for Respondents to provide any justification for their actions in response to Petitioner's protected activity of opposing directives to file charges without probable cause and to disregard the rules of procedure. Additionally, as indicated previously, for two other actions, placement of Petitioner on an alleged PIP and removing him from litigation of the Stevens matter, it was impossible for Respondents to provide a legitimate reason since the stated reasons for each post-dated the determination to take the action. Not only is this clear evidence of pretext but it clearly refutes the proffered

legitimate reason provided since the reason "did not motivate [Respondents] at the time of the decision."

Thereafter, the decision proceeded to conclude, as a matter of law and only due to the disregard of Petitioner's evidence, that Respondents provided non-retaliatory justifications for their adverse actions, that Petitioner failed to provide evidence of pretext, and that no retaliation occurred. App. 74-80.

The decision's determinations of intent and the ultimate issue of retaliation were improper and contrary to the holdings of this Court since they were factual determinations to be left for a jury's determination:

> As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Ante,* at 2108. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). But the inference remains--unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of

> law, see *ante,* at 2110-2111, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above. *Reeves,* 530 U.S. at 154-155 (GINSBURG, J., concurring).

As demonstrated previously herein, none of the evidence submitted by Respondents was required to be believed by a factfinder, whether that be a jury or a court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In Pro Per

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN KONIG,

Plaintiff-Appellant,

v.

THE STATE BAR OF CALIFORNIA; LAWRENCE J. DAL CERRO; RUSSELL WEINER; ALLEN BLUMENTHAL; and ROBERT HAWLEY,

Defendant-Appellees.

No. 05-17342

D.C. No. CV 04-2210 MJJ

MEMORANDUM*

(Filed Nov. 8, 2007)

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Submitted October 18, 2007**
San Francisco, California

Before: ROTH,*** THOMAS, and CALLAHAN, Circuit Judges

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. 34(a)(2).

*** The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Alan Konig brought an action in U.S. District Court against the State Bar of California and four of its employees in their individual and official capacities, claiming violation of his civil rights under 42 U.S.C. § 1983 and asserting state law causes of action for retaliation under California Labor Code §§ 1102.5, *et seq.*, California Government Code §§ 9149.20, *et seq.*, and under the common law doctrine established pursuant to the California Supreme Court's decision in *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980). The district court dismissed all causes of action against the State Bar and the defendants in their official capacities based on Eleventh Amendment immunity and entered summary judgment for all defendants on the remaining claims. Konig appealed.

The district court had jurisdiction of this case under 28 U.S.C. §§ 1331 and 1367. We have jurisdiction under 28 U.S.C. § 1291. We have carefully considered the three very thorough memorandum opinions of the district court, the appellate briefs of the parties, and the voluminous appendices before this Court. On the basis of our review, we find that the district court properly granted judgment in favor of the defendants.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALAN KONIG,

Plaintiff,

v.

THE STATE BAR OF CALIFORNIA; LAWRENCE J. DAL CERRO; RUSSELL WEINER; ALLEN BLUMENTHAL; and ROBERT HAWLEY,

Defendants.

/

No. C 04-2210 MJJ

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS KONIG'S FIRST AMENDED COMPLAINT

(Filed Sep. 16, 2004)

INTRODUCTION

Before the Court is a motion to dismiss brought by Defendants The State Bar of California ("State Bar"), Lawrence J. Dal Cerro, Russell Weiner, Allen Blumenthal, and Robert Hawley (collectively, "Defendants") in this employment retaliation case. Plaintiff Alan Konig opposes the motion. For the reasons set forth below, the motion is **GRANTED IN PART** and **DENIED IN PART**.

FACTUAL BACKGROUND

Plaintiff was, and may currently be, employed by Defendant State Bar as Deputy Trial Counsel within the Office of the Chief Trial Counsel ("OCTC") in San Francisco. (Complaint ("Compl.") at 2:5-7.) Plaintiff

was charged with litigating matters in the State Bar Court and State Superior Court related to attorney admission, licensing, regulation, and discipline. (*Id.* at 2:23-27.) Plaintiff alleges that beginning in May 2003, he repeatedly advised Defendants Dal Cerro and Weiner that various rulings and orders in several State Bar Court matters violated the State Bar's state and federal constitutional rights, violated witnesses' state and federal constitutional rights, and disregarded binding precedent. Moreover, Plaintiff advised his colleagues that the State Bar Court lacked judicial decorum and acted contrary to the Code of Judicial Ethics. (*Id.* at 3:1-8.) Plaintiff urged Defendant Dal Cerro to take action in response to the conduct of the State Bar Court, and informed Defendant Dal Cerro that if he did not take action, Plaintiff himself would report the actions of the State Bar Court to the California Commission on Judicial Performance (CJP). Plaintiff's requests were rejected. (*Id.* at 3:9-16.)

On September 11, 2003, Plaintiff submitted to Defendant Dal Cerro a memorandum detailing, among other things, the malfeasance of Defendants in performing their statutory obligations. (*Id.* at 3:17-22.) On November 3, 2003, Plaintiff allegedly complained to the CJP. Plaintiff now alleges that the OCTC discovered the CJP complaint and required Plaintiff to confirm that he was the complainant. (*Id.* at 3:23-25.) In November and December of 2003, Plaintiff made similar complaints to the State Bar Board of Governors, the California Senate and Assembly

Judiciary Committees, and the California State Personnel Board. (*Id.* at 4:1-6.)

The gravamen of Plaintiff's complaint is that beginning in October 2003, Defendants allegedly have "repeatedly directed Plaintiff to engage in activity or conduct that would violate the rules of Procedure of the State Bar of California, the California Rules of Professional Conduct, and the State Bar Act as codified at California Business & Professions Code section 6000, *et seq.*" (*Id.* at 4:7-11.) Plaintiff alleges that he "repeatedly refused to comply with each directive." (*Id.* at 4:10-11.)

Plaintiff's complaint asserts state law causes of action for (1) retaliation under California Labor Code sections 1102.5(a),(b), and (e), (2) retaliation under California Government Code sections 9149.20, *et seq.*, and (3) retaliation under the common law doctrine established in *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167 (1980). Plaintiff asserts two federal law causes of action under section 1983 of the Civil Rights Act (42 U.S.C. 1983), (1) asserting retaliation for speech protected by the First Amendment, and (2), asserting the denial of his due process rights under the Fourteenth Amendment. Within all five causes of action, Plaintiff alleges that Defendants committed an adverse employment action, permitted the disparate and unfair treatment of Plaintiff, permitted the harassment of Plaintiff, and permitted a hostile work environment. Because the complaint does not specify which causes of action are directed at each of the five defendants, the Court assumes that Plaintiff

intended to direct each cause of action against all defendants.

LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims asserted in the complaint. *See Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337 (9th Cir. 1996). Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957)). In reviewing such a motion, the Court must assume all factual allegations to be true and must construe them in the light most favorable to the nonmoving party. *See North Star v. Arizona Corp. Comm.*, 720 F.2d 578, 580 (9th Cir. 1983). The Court will dismiss the complaint or any claim in it without leave to amend only if "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

In the context of a motion to dismiss, review is limited to the contents of the complaint. *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). However, matters properly presented to the court, such as those attached to the complaint and incorporated within its allegations, may be considered as part of the motion to dismiss.

See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

ANALYSIS

I. Eleventh Amendment Sovereign Immunity

A. The State Bar's Immunity

As a threshold matter, the Court must decide whether any of Plaintiff's claims are barred by the Eleventh Amendment. Sovereign immunity under the Eleventh Amendment creates a subject matter jurisdictional hurdle for plaintiffs suing state governments in federal court. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (declaring that "the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III."). Specifically, "[t]he Eleventh Amendment bars suits which seek either damages or injunctive relief against a state, an 'arm of the state,' its instrumentalities, or its agencies." *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) (citing *Durning v. Citibank N.A.*, 950 F.2d 1419, 1422-23 (9th Cir. 1991)).

While there is considerable debate over what type of entity the State Bar is in the context of other constitutional and statutory claims, the narrow issue before the Court is whether the State Bar is subject to Eleventh Amendment immunity. The Ninth Circuit and this Court have held that the Eleventh Amendment applies to the State Bar. *See Hirsh v. Justices of the Supreme Court*, 67 F.3d 708, 715 (9th Cir. 1995)

(per curiam) (holding that "sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court."); *Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985) (finding that the Eleventh Amendment bars suit against California's State Bar Board of Governors and the Committee of Bar Examiners); *Wu v. State Bar of California*, 953 F. Supp. 315, 318-319 (N.D. Cal. 1997) (noting that the "Eleventh Amendment provides the State Bar of California with immunity from suits in federal court for monetary relief."); *Ramos v. California Comm. of Bar Examiners*, 857 F. Supp. 702, 705 (N.D. Cal. 1994) (finding that the Committee of Bar Examiners is "clearly an arm of the State" for Eleventh Amendment purposes.).

Plaintiff makes an interesting argument that the State Bar is not a state agency, and therefore, not subject to Eleventh Amendment immunity. Plaintiff relies on *Keller v. State Bar of California*, 496 U.S. 1 (1990), which held that the State Bar could not use its members' compulsory dues to finance political and ideological activities not related to the purpose of regulating the legal profession or improving the quality of legal services. *Id.* at 4, 13-14. In arriving at this holding, the Court found that for purposes of federal law, the "State Bar of California is a good deal different from most other entities that would be regarded in common parlance as 'governmental

agencies.'"[1] *Id.* at 11. The Court went on to delineate the differences between the State Bar and typical state agencies, finding that the State Bar was more analogous to a labor union. *Id.* at 12.

While Plaintiff is correct in his understanding of the *Keller* holding and analysis, the case has no relevance in the context of Eleventh Amendment sovereign immunity. *Keller* is a First Amendment freedom of speech and association case. The case does not hold, or even suggest, that the State Bar is not entitled to immunity.[2] Similarly, Plaintiff's reliance on *Hoffman v. State Bar*, 113 Cal. App. 4th 630 (2003), is inapposite because the case does not address the status of the State Bar in the context of the Eleventh Amendment.[3]

Plaintiff correctly refers to the *Mitchell* factors used to determine whether a particular state entity is

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[1] The State Bar's argument in *Keller* was that its status as a regulated state agency exempted it from any constitutional constraints on the use of its compulsory dues. *Keller*, 496 U.S. at 10.

[2] *Keller* was before the Court on a grant of writ of certiorari from a decision rendered by the California Supreme Court. *Keller*, 496 U.S. 1.

[3] Plaintiff argues that the State Bar should be collaterally estopped from litigating the Eleventh Amendment immunity issue, presumably because the State Bar was a party to the *Keller* and *Hoffman* cases. Because Eleventh Amendment immunity was not the legal issue in those cases, Defendant State Bar is not collaterally estopped from litigating the issue in the present case.

a state agency entitled to Eleventh Amendment immunity. *See Mitchell v. Los Angeles*, 861 F.2d 198, 201 (9th Cir. 1988).[4] Interestingly, the Ninth Circuit did not apply these *Mitchell* factors, or any other test, to determine whether the State Bar was a state agency for immunity purposes in *Hirsh* and *Lupert*, *supra*. While it is unclear whether the State Bar would be deemed a state agency if the Ninth Circuit were to analyze the issue applying the *Mitchell* factors, the law in this circuit holds that the State Bar is immune from suits seeking monetary or injunctive relief in federal court. *See Yong v. Immigration and Naturalization Serv.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2001) ("once a federal circuit court issues a decision, the district courts are bound to follow it"); *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987) (noting that district courts are bound by the law of their own circuit "'no matter how egregiously in error they may feel their own circuit to be'").

B. Individual Defendants' Immunity

The Eleventh Amendment immunity of the State Bar extends to Defendants Dal Cerro, Weiner, Blumenthal, and Hawley. *See Hirsch*, 67 F.3d at 715. The

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[4] The factors are "whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity." *Mitchell*, 861 F.2d at 201.

Supreme Court has held that a defendant acting in his official capacity receives the same immunity as the government agency for which he works. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). However, "state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts." *Id.* at 31. Because Plaintiff has sued Defendants Dal Cerro, Weiner, Blumenthal, and Hawley individually, in addition to suing them in their official capacities, the individual Defendants are not immune from Plaintiff's section 1983 claims.

Furthermore, the Eleventh Amendment does not bar suits to enjoin violations of federal law against state officers.[5] *Ex Parte Young*, 209 U.S. 123, 159-160 (1908). Since Plaintiff has sued Defendants for injunctive relief (Comp. at 10:24-28, 11:1-5), this relief sought by Plaintiff is not barred by the Eleventh Amendment.

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[5] This exception to Eleventh Amendment immunity applies only to prospective relief, even when compliance with the injunction will cost the state a great deal of money in the future. The exception does not extend to retroactive relief. *See Edelman v. Jordan*, 415 U.S. 651 (1974).

C. State Law Claims

Defendant State Bar and Defendants, acting in their official capacity, are immune from Plaintiff's state law claims. The Supreme Court has held that Eleventh Amendment immunity applies to state law claims brought in federal court under supplemental jurisdiction. *Pennhurst*, 465 U.S. at 121. Moreover, the *Ex Parte Young* exception to Eleventh Amendment immunity does not apply to state law claims. The Court has held that federal courts are barred by the Eleventh Amendment from enjoining state officers from violating state law. *Pennhurst*, 465 U.S. at 106 (noting the intrusion on state sovereignty when a federal court instructs state officials on how to conform their conduct to state law). In this case, the state law retaliation claims against Defendant State Bar and Defendants, acting in their official capacity, are barred by the Eleventh Amendment. This immunity does not extend to Plaintiff's state law claims against Defendants, sued as individuals.

II. Federal Law Claims

A. Motion to Dismiss Section 1983 Claims for Failure to Plead Sufficient Facts

Defendants contend that Plaintiff's section 1983 claims against the individual defendants fail to state any specific allegations against any of them, and thus must be dismissed under Federal Rule of Civil Procedure 12(b)(6). (State Bar's Motion to Dismiss ("Mot.") at 7:1.)

Motions to dismiss for failure to state a claim "are generally viewed with disfavor." *Ramos*, 857 F. Supp. at 704. "Each averment of a pleading shall be simple, concise, and direct." Fed. R. Civ. Proc. § 8(e)(1). Under this liberal pleading standard, "a complaint should not be dismissed unless it appears 'beyond doubt' that plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief." *Ramos*, 857 F. Supp. at 704 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Moreover, courts must assume that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 521 (9th Cir. 1994).

Defendants argue that Plaintiff's complaint fails to make "specific allegations" and consists of insufficient "generic pleading." (Mot. at 7, 8:13-16.) Relying on *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984), Defendants argue that "[c]onclusionary allegations, unsupported by facts, will be rejected as insufficient to state a claim under the Civil Rights Act." (Mot. at 7:3-5.) Furthermore, Defendants rely on *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998), noting that "the court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive . . . in order to survive a prediscovery motion for dismissal or summary judgment." (Mot. at 7:7-12.)

In interpreting *Crawford-El*, the Ninth Circuit has noted that "nearly all of the circuits have now disapproved any heightened pleading standards in

cases other than those governed by Rule 9(b)." *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). The Ninth Circuit also has noted the Supreme Court's holding that "courts could not impose a heightened pleading standard on plaintiffs alleging § 1983 claims against municipalities."[6] *Id.* at 1124 (referring to *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993)). These findings in *Galbraith* evidence that both the Supreme Court and Ninth Circuit adhere to liberal pleading standards for section 1983 actions.

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.* 901 F.2d 696, 699 (9th Cir. 1990). The issue then is whether Plaintiff's federal claims sets forth sufficient facts alleged under a cognizable legal theory.

B. First Amendment Claim

Defendants argue that Plaintiff's claim for retaliation for the exercise of his First Amendment rights should be dismissed. (Mot. 7-9.) Specifically, Defendants assert that "workplace gripes do not constitute protected speech" and that public employees do

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[6] Although the State Bar is more akin to a state agency than a municipality, this distinction is likely irrelevant for section 1983 pleading standards.

not "have a constitutional right to be insubordinate." (*Id.* at 8:18, 24.)

A prima facie case of retaliation under the First Amendment requires a showing that "(1) The plaintiff] engaged in protected speech; (2) the defendants took an 'adverse employment action' against [him]; and (3) [his] speech was a 'substantial or motivating' factor for the adverse employment action." *Thomas v. City of Beaverton*, No. 03-35120, 2004 U.S. App. LEXIS 16739, at *8 (9th Cir. Aug. 16, 2004) (citation omitted). For the first prong, speech is protected if the plaintiff spoke "'as a citizen upon matters of public concern.'" *Id.* at *8 (citation omitted). "Unlawful conduct by a government employee or illegal activity within a government agency is a matter of public concern." *Id.* at *11. Second, an adverse employment action "need not be severe and it need not be of a certain kind." *Coszalter v. City of Salem*, 320 F. 3d 968, 975 (9th Cir. 2003) (noting that the relevant inquiry is "whether the state had taken 'action designed to retaliate against and chill political expression'") (citation omitted). Lastly, whether Plaintiff's speech motivated the adverse employment action is a triable issue of fact.

In his complaint, Plaintiff averred that his speech, directed at both Defendants and appropriate governmental oversight agencies, consisted of complaints regarding the State Bar Court's violation of constitutional rights. (Compl. at 3-4.) This type of speech, regarding illegal activity within a government agency, is protected by the First Amendment.

Moreover, Plaintiff alleged that in response to these complaints, Defendants subjected Plaintiff to harassment, threats, disparate and unfair treatment, and permitted a hostile work environment. (*Id.* at 8:24, 27-28.) The Court finds that for purposes of a 12(b)(6) motion to dismiss, Plaintiff has plead sufficient facts for a retaliation claim under the First Amendment.

C. Fourteenth Amendment – Due Process Claim

Again, the issue is whether Plaintiff's federal claims set forth sufficient facts alleged under a cognizable legal theory. *Balistreri*, 901 F.2d at 699. To prevail, Plaintiff is required to show "(1) a property interest protected by the Constitution; (2) a deprivation of the interest by the government; and a (3) lack of required process." *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 974 (9th Cir. 2002). Assuming arguendo that Plaintiff has a property interest in his employment at the State Bar, there is no indication in Plaintiff's pleadings that Defendants have deprived him of this interest.[7] The cases addressing the deprivation of a property interest in state

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[7] Plaintiff's complaint states that his employment with Defendant State Bar "is not 'at will' and is only terminable by Defendant State Bar for 'good cause.'" (Compl. ¶ 48.) However, Plaintiff fails to allege anywhere in the pleading that he was even terminated. Plaintiff did not brief this issue in his opposition to the motion to dismiss.

employment involve either the resignation, denial of some benefit or future employment, or most commonly, the termination of the plaintiff employee. *See Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (failure to rehire professor); *Ulrich*, 308 F.3d 968 (resignation of doctor); *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321 (9th Cir. 1995) (termination of airport employees); *Walker v. Berkeley*, 951 F.2d 182 (9th Cir. 1991) (termination of city employee); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of civil servant security guard). In his complaint, Plaintiff merely alleges that Defendants directed him to engage in "activity or conduct that would violate" the law. (Comp. ¶ 17.) Plaintiff does not cite to any case law which suggests that this directive constitutes a deprivation of one's property interest. For this reason, Plaintiff's Fourteenth Amendment due process claim is dismissed.

III. STATE LAW CLAIMS

A. Applicability of California Tort Claims Act ("CTCA")

Plaintiff brings three state law retaliation claims against Defendants under California Labor Code sections 1102.5(a),(b), and (e), Government Code section 9149.23, and under the common law *Tameny*

doctrine.[8] Defendants seek dismissal of these claims based on Plaintiff's failure to comply with the CTCA. Under section 945.4 of the California Government Code, "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board . . . " Cal. Gov. Code § 945.4. "Timely compliance with the claim filing requirements and rejection of the claim by the governmental agency must be pleaded in a complaint in order to state a cause of action." *Dujardin v. Ventura County General Hospital*, 69 Cal. App. 3d 350, 355 (1977). This state law requirement applies in federal court. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 627 (9th Cir. 1998) (affirming dismissal of state law claims for "fail[ing] to allege compliance with California tort claim procedures.").

Plaintiff asserts, similar to his Eleventh Amendment argument, that since Defendant State Bar is not a state agency for federal law purposes, the CTCA does not apply and Defendant cannot invoke the CTCA as a defense. (Konig's Opposition ("Opp.") at 16:3-11.) Plaintiff's argument is without merit. First, the CTCA applies to "local public entities," which include "public corporation[s] in the State." Cal. Gov.

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[8] The Court has already determined in Part I of this Order that claims against Defendant State Bar and Defendants, acting in their official capacity, are not cognizable under *Pennhurst*.

Code § 900.4. Under the California Business and Professions Code, "[t]he State Bar is a public corporation." Cal. Bus. & Prof. Code § 6001. A California court has also noted precedent finding that the CTCA applies to tort allegations against the State Bar. *Smith v. State Bar*, 212 Cal. App. 3d 971, 976 (citing *Engel v. McCloskey*, 92 Cal. App. 3d 870 (1979)).

Plaintiff also argues that his state law claims under Labor Code section 1102.5 and Government Code section 9149.20 are exempt from the CTCA: "In essence, the section states the obvious – the Act does not abrogate existing statutory claims (as opposed to common law tort claims)." (Opp. at 16:13-15.) However, under the CTCA all governmental tort liability is based on statute, as opposed to common law tort doctrine. *See Soliz v. Williams*, 74 Cal. App. 4th 577, 585 (1999). Furthermore, in *Shoemaker v. Myers*, 2 Cal. App. 4th 1407, 1425-1426 (1992), a California appellate court applied the claim requirements of section 945.4 to the plaintiff's statutory whistleblower claim and *Tameny* claims. For these reasons. Plaintiffs state law causes of actions are claims required to be presented to the State Bar before bringing suit for money or damages. Absent allegation satisfying this requirement, Defendants' request for dismissal is appropriate.

Plaintiff's argument that his claim for injunctive relief precludes adherence to section 945.4 is without merit. (Opp. at 16:20-24.) It is true that claims for injunctive and declaratory relief need not be presented to the State Bar under section 945.4 before

bringing suit. *Snipes v. City of Bakersfield*, 145 Cal. App. 3d 861, 870 (1983). However, in *Loehr v. Ventura County Community College Dist.*, 147 Cal. App. 3d 1071, 1081 (1984), the court found that the general rule that the claims statutes do not apply to actions seeking injunctive relief "has no application ... where a petition for extraordinary relief is merely incidental or ancillary to a prayer for damages." While Plaintiff's third prayer for relief seeks injunctive relief, this relief is merely ancillary to his prayer for compensatory and punitive damages for loss of compensation, loss of enjoyment, pain and suffering, and emotional distress. (Compl. 10-11.)

Finally, Plaintiff's submission of a claim, pursuant to California Government Code section 9149.21, to the State Bar Board of Governors ("BOG") in November 2003 is inadequate for section 945.4 purposes. (Compl. ¶ 15; Opp. at 17:1-4.) Section 9149.21 states the legislative intent of the California Whistleblower Protection Act. Plaintiff cannot rely on his "whistleblowing" complaint, which was to notify the BOG of the State Bar Court's constitutional violations, to meet the requirements of section 945.4. A section 945.4 claim must include a description of Plaintiff's injury and the name of the employee who caused the injury. Cal. Gov. Code § 910. Plaintiff does not aver that his complaint to the BOG meets this standard. For the foregoing reasons, Plaintiff's state claims against Defendants are dismissed.

B. Alternative Grounds for Dismissal of Plaintiff's First, Second, and Third Causes of Action (Retaliation Claims)

Plaintiff brings three retaliation claims against Defendants under California Labor Code sections 1102.5(a),(b), and (e), Government Code section 9149.23, and under the common law *Tameny* doctrine.

Defendants correctly assert that Labor Code section 1102.5 applies to employers. (Mot. 12:18-19.) Plaintiff does not dispute this assertion. (Opp 19:20-21.) Because the Eleventh Amendment bars suit against the State Bar, the employer in this action, Plaintiff's section 1102.5 claim is dismissed.

Likewise, Government Code section 9149.23 only applies to employees, and Plaintiff does not dispute this finding. (Opp. 19:20-21.) Because the Eleventh Amendment applies to Defendants acting in their official capacity, this claim is dismissed as to those Defendants. The Eleventh Amendment would not be a bar, however, to Plaintiff's section 9149.23 claim against Defendants in their individual capacity.

Finally, Plaintiff brings a claim under *Tameny v. Atlantic Richfield Company*, 27 Cal. 3d 167 (1980). (Compl. at 7-8.) *Tameny* held that "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Id.* at 170. Because the State Bar, the employer in this action, is immune from suit under the Eleventh

Amendment, the *Tameny* claim is dismissed without prejudice.[9]

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. All claims, state and federal, against the State Bar are **DISMISSED** as barred by the Eleventh Amendment, without prejudice to refiling in state court;

2. All federal claims against the individual Defendants in their official capacities are **DISMISSED** as barred by the Eleventh Amendment to the extent Plaintiff seeks an award of damages, without prejudice to refiling in state court;

3. Defendants' motion to dismiss Plaintiff's section 1983 Civil Rights claim for retaliation for the exercise of his First Amendment rights is **DENIED** to the

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[9] *Tameny* claims require an employer-employee relationship. *See Weinbaum v. Goldfarb, Whitman & Cohen*, 46 Cal. App. 4th 1310, 1315 (1996). "As a matter of law, only an employer can be liable for the tort of wrongful discharge in violation of public policy." *Khajavi v. Feather River Anesthesia Med. Group*, 84 Cal. App. 4th 32, 53 (2000). *See also Reno v. Baird*, 18 Cal. 4th 640, 663 (holding that individual supervisors may not be sued under a cause of action for wrongful discharge in violation of public policy). Consequently, the Court assumes that Plaintiff only intended to bring his *Tameny* claim against the State Bar.

extent that Plaintiff seeks relief against Defendants in their individual capacities;

4. The section 1983 Civil Rights claim for a denial of Plaintiff's Fourteenth Amendment property interest is **DISMISSED** without prejudice;

5. All state law claims against individual Defendants in their official capacities are **DISMISSED** as barred by the Eleventh Amendment and *Pennhurst*, without prejudice to refiling in state court;

6. Plaintiff's Labor Code section 1102.5 claim and *Tameny* claim against individual Defendants in their individual capacities are **DISMISSED** with prejudice;

7. Plaintiff's Government Code section 9149.23 claim against individual Defendants in their individual capacities is **DISMISSED** with leave to amend to the extent that Plaintiff is able to plead compliance with section 945.4 of the CTCA.

Should Plaintiff decide to replead any dismissed claims cognizable in federal court, he must do so within 20 days of the filing of this Order.

IT IS SO ORDERED.

Dated: September 16, 2004

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALAN KONIG,
Plaintiff,
v.
LAWRENCE J. DAL CERRO, ET AL.,
Defendants. /

No. C-04-2210 MJJ

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Oct. 11, 2005)

INTRODUCTION

Before the Court is Defendants' motion for partial summary judgment in this § 1983 lawsuit. Plaintiff Alan Konig ("Plaintiff") opposes the Motion. After careful consideration of the parties' briefs and after oral argument on the motion, the Court **GRANTS** Defendants' motion for partial summary judgment for the following reasons.

FACTUAL BACKGROUND[1]

Plaintiff Konig was employed by the State Bar of California as Deputy Trial Counsel within the Office of the Chief Trial Counsel ("OCTC") in San Francisco from May 17, 1999, until October 27, 2004. The Chief

[1] The facts described herein are taken from the parties' briefs. Wherever the parties appear to dispute a particular fact, each party's interpretation of what occurred is identified as such.

Trial Counsel has exclusive jurisdiction over the State Bar's prosecutorial decisions. Defendant Robert Hawley is the Deputy Executive Director of the OCTC. The Deputy Chief Trial Counsel, Defendant Russell Weiner, supervises several Assistant Chief Trial Counsel, who are each in charge of a unit comprised of Senior Trial Counsel, Deputy Trial Counsel, paralegals, and investigators. Defendant Lawrence J. Dal Cerro, who serves as Assistant Chief Trial Counsel, and Defendant Allen Blumenthal, Senior Trial Counsel, both supervised Plaintiff.

As Deputy Trial Counsel, Plaintiff was charged with litigating matters in the State Bar Court and State Superior Court related to attorney admission, licensing, regulation, and discipline. Through performance evaluations and otherwise, Plaintiff was regularly recognized for his outstanding work. In the Manager's Comments section of his 2000-2001 performance review, however, it was noted that Konig was "very aggressive" and that "he experienced some difficulty dealing with opposing counsel." (Declaration of Robert Hawley ("Hawley Decl."), Ex. C.) Konig was advised to "consider adopting a less aggressive posture" and that he "may find that a less confrontational style would benefit the orderly processing of his cases, create an atmosphere more conducive to settlement and enhance his dealings with both the Court and opposing counsel." (*Id.*)

A. Plaintiff's 2002-2003 Interaction With, and Complaints About, State Bar Court Judges

In San Francisco, there are only two State Bar Court judges: Judge Patricia McElroy and Judge Joanne Remke. Beginning in 2002, Plaintiff became increasingly concerned about improper rulings and orders from the State Bar Court judges. He believed that both judges lacked judicial decorum and often acted contrary to the Code of Judicial Ethics. He began to vocalize his concerns to his superiors at the OCTC in September 2002. Plaintiff claimed that various State Bar Court rulings violated the State Bar's state and federal constitutional rights, violated witnesses' state and federal constitutional rights, and disregarded binding precedent. For example, in a September 5, 2002, email to Defendant Dal Cerro, Plaintiff complained that Judge McElroy had engaged in extensive *ex parte* communications with opposing counsel when she granted requests for extensions of time without first consulting Konig. (Declaration of Lawrence J. Dal Cerro ("Dal Cerro Decl."), Ex. A.) On September 17, 2002, Plaintiff drafted a memorandum to the file in the *Wells* matter threatening to suspend an Early Neutral Evaluation Conference ("ENEC") when Judge McElroy questioned the factual basis of Plaintiff's Notice of Disciplinary Charges ("NDC") and suggested that the State Bar agree to reduced discipline. (*Id.*, Ex. B.) On another occasion, Plaintiff found fault with a State Bar Court decision rendered in his own office's favor. He complained that Judge McElroy's decision disbarring an attorney was "so

fraught with factual errors and erroneous legal conclusions" that he was embarrassed to show it to the complaining witnesses and he "wondered" if McElroy had read the evidence or his brief. (*Id.*, Ex. C.) He urged his supervisors to seek review of the favorable decision. In May 2003, Plaintiff complained in an email that he had "reached [his] breaking point" with Judge Remke as well, when she denied his motion to continue a trial. Plaintiff claims that he urged Defendant Dal Cerro to take action in response to the conduct of the State Bar Court, and informed Dal Cerro that if he did not do so, Plaintiff himself would report the State Bar Court's actions to the California Commission on Judicial Performance ("CJP"). (*Id.*, Ex. D.) Defendants took no action.

Defendants contend that due to the "small, 'repeat player' nature of this bar and bench, it is critical that all State Bar prosecutors in San Francisco have a professional working relationship with both of these judges." (Motion at 2:13-15.) According to Defendants, Plaintiff began displaying disrespect for both judges in 2002. Specifically, he repeatedly refused to comply with judicially-set time limits for witness examinations and complained to the judges about such limits being imposed. He accused Judge Remke of bias against him for denying a motion to compel discovery and, during a trial in 2003 (the *Bajaj* trial), was apparently so disrespectful in court that Judge Remke warned him that he would be

required to bring his supervisor to court if he continued.[2] A month later, during the *Wells* trial, also before Judge Remke, Plaintiff again refused to comply with the time limit set for conducting a witness examination and behaved contemptuously. When Judge Remke instructed Plaintiff to summon Dal Cerro to the courtroom, Plaintiff refused, claiming that she did not have the power to make such an order of the State Bar. Judge Remke then summoned Dal Cerro herself.

B. Plaintiff's Conduct At, and Complaints, About the OCTC

On September 11, 2003, the day after he attended an ENEC in the *Kay/Dalton* matter with supervisor Donald Steedman (not a defendant here), Plaintiff delivered an eight-page memorandum to Defendant Dal Cerro entitled, "State of Office Working Environment." (*Id.*, Ex. G.) In that memo, Plaintiff

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[2] After the trial, which the State Bar lost, Defendant Blumenthal was assigned, over Konig's objection, to review the *Bajaj* trial record. In April 2004, Blumenthal recommended that the Bar withdraw its request for review. He concluded that there was an insufficient legal basis for appeal and that Konig's handling of the matter was "disturbing" and unprofessional. He was particularly concerned that Konig had treated Judge Remke so disrespectfully, that he had engaged in inappropriate communications with a witness, and that he had delayed propounding discovery in the case until very late in the discovery period, significantly impairing the case. (Declaration of Allen Blumenthal ("Blumenthal Decl."), Ex. K.)

complained about low morale at the office and about feeling betrayed by his superiors. Specifically, Plaintiff complained that Dal Cerro had "backstabbed" Plaintiff by coming to court at Judge Remke's insistence and by allowing Judge Remke to "dress me down." He also complained that Steedman had "undercut" him at the September 10 *Kay/Dalton* ENEC by agreeing to the other side's request for an extension of time when Plaintiff did not want to so agree. In the memorandum, Plaintiff accused Judge Remke of bias and misconduct for: (1) referring to an Immigration Judge as "Mr. Abrams" instead of "Judge Abrams;" (2) "improperly" allowing a witness to be questioned about his medical condition; (3) disallowing a line of re-direct examination she found irrelevant and ruling on an objection without allowing Plaintiff what he felt was sufficient time to respond to the objection; and (4) disallowing Plaintiff from asking another witness about unrelated discipline. (Dal Cerro Decl., Ex. G.) Plaintiff said he was tired, angry, frustrated, and no longer passionate about his job. "I refuse to conduct another ENEC or settlement conference under the current policy," Plaintiff wrote. (*Id.*) He threatened to resign the "next time [he] fe[lt] betrayed by this office." (*Id.*) Soon thereafter, Plaintiff wrote a letter to Judge Anello, the complaining witness in *Kay/Dalton,* in which he disclosed that there had been an internal disagreement over whether and when to file charges. (*Id.*, Ex. J.) He informed Anello that "supervising attorneys" often do not have complete knowledge of the cases when they attend ENECs and suggested that Steedman made the

wrong decision in agreeing to the respondent's request for additional time. (*Id.*) According to Defendants, the letter improperly disclosed the Bar's work product and mocked Steedman's authority.

On September 23, 2003, Dal Cerro and Steedman met with Plaintiff and a union representative. According to Defendants, Dal Cerro attempted to counsel Plaintiff about his anger and his need to be less confrontational and accusatory. According to Plaintiff, at that meeting, Dal Cerro made several false allegations against Plaintiff related to his work and his insubordinate conduct. On October 31, 2003, Dal Cerro delivered a written response to Plaintiff's memorandum that he and Defendant Hawley had prepared. The response informed Plaintiff that the OCTC is not a democracy and that Plaintiff is not a free agent. (*Id.*, Ex. H.) According to Plaintiff, the response contained numerous vague and unwarranted allegations of misconduct against Plaintiff and included a "veiled threat that [Konig] either accept the way things are done and stop raising issues of wrongdoing and malfeasance or [he] would no longer have a job." (Jan. 18, 2005, Declaration of Alan Konig ("Konig Decl. – Jan."), ¶ 15.) Plaintiff responded with another memorandum in November complaining that the concerns he had raised in the September memo had gone addressed. (Dal Cerro Decl., Ex. I.)

Defendants contend that during this same time, they became so concerned about the theories and facts Plaintiff had included in his draft NDC in the *Kay/Dalton* matter that Steedman instructed Konig's

assistant not to file the NDC. Steedman also instructed Konig to cease communicating with the complaining witness because Plaintiff was creating "all types of pratfalls to [Anello] being a successful witness in the proceeding by involving him" in the charging decisions. (Dal Cerro Decl., Ex. K.) Konig objected saying, "[C]utting me out of this case after I committed significant and substantial time and energy has created a feeling within me that words cannot adequately describe." On October 24, Plaintiff asked, in writing, that the case be reassigned because he could not "operate in a cloud of secrecy knowing that conversations about this matter have occurred that I am not privy to." (*Id.*, Ex. M.) The case was reassigned to Defendant Blumenthal. On November 10, Plaintiff sent an email to Dal Cerro complaining about the reassignment and asking for an explanation. (*Id.*, Ex. N.)

On November 3, 2003, Plaintiff filed a formal complaint with the CJP about Judge Remke's lack of judicial decorum, unprompted character attacks on Konig, and general misconduct. (Declaration of Emilia Mayorga ("Mayorga Decl."), Ex. I.) Defendants claim not to have known about this complaint. Plaintiff, however, alleges that Defendants were aware of the CJP complaint because he had hinted at it in conversations with Dal Cerro and Blumenthal. In November and December of 2003, Plaintiff made similar complaints to the California State Personnel

Board,[3] the California Senate and Assembly Judiciary Committees, and the State Bar Board of Governors' Regulation, Admissions, and Discipline Oversight Committee ("RAD").[4] According to Plaintiff, the day before he submitted his complaint to RAD, Defendant Hawley emailed John Van de Kamp, RAD's Chair, to discuss Konig's forthcoming complaint. Plaintiff claims that Hawley defended his and Dal Cerro's actions and made prejudicial statements about Plaintiff. According to Plaintiff, Hawley suggested to RAD how Plaintiff's complaint should be dealt with and hired an investigator, who was purported to be independent but who was not, to look into Plaintiff's claims. (*See* footnote *4, supra.*) According to Plaintiff, Defendant Hawley also wrote to the legislative committees to which Konig had complained, and represented

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[3] The State Personnel Board rejected Konig's complaint.

[4] After investigating Konig's claims, the investigator hired to look into Plaintiff's complaint, concluded that Konig's actions, and not the actions of his supervisors, were the cause of the "workplace conflicts which form the basis of his complaints." (Declaration of Charlotte Addington, Ex. A at 56-58.)

Plaintiff contends, however, that Defendant Hawley was actually in control of the investigation, and not RAD. He says that Hawley hand-picked Ms. Addington, with whom Hawley used to work and maintained a friendship, as the independent investigator. (Konig Decl. – Jan., ¶ 51.) To support his allegation, Plaintiff claims that Hawley telephoned Addington on December 8 and 10. Ms. Addington's notes from the December 10, 2003 call state, "Bob [is] contact" and "Konig will question my role." (*Id.*, ¶ 53.) On December 11, Hawley wrote to Van de Kamp informing him that Charlotte Addington would conduct an "independent investigation."

that Mr. Van de Kamp was directing an appropriate investigation into Konig's complaints.

On November 14, 2003, Plaintiff met with Steedman to discuss the *Mendez* NDC. Steedman gave Konig handwritten comments including edits and the deletion of three of 15 counts. On November 17, 2003, Plaintiff filed the *Mendez* NDC without having incorporated Steedman's changes. When asked about it, Plaintiff said that Steedman had not specifically instructed him not to file the NDC without making the changes. On November 20, 2003, Dal Cerro and Steedman met with Plaintiff and union representative Rob Henderson to discuss Plaintiff's conduct. Dal Cerro and Steedman presented Plaintiff with a Disciplinary Notice (Written Warning). (*Id.*, Ex. Q.) The Written Warning explained that Konig had insubordinately failed to make changes to the draft NDC in *Mendez* as had been requested by his supervisor and that he then denied being instructed to make those changes. The Warning required, among other things, that Plaintiff file an amended NDC by November 24, 2003. Plaintiff was also warned that if he "continue[d] to fail to follow the direction of [his] supervisors or otherwise engage[d] in acts of insubordination, disobedience, or disrespect, [he would] be subject to additional discipline, up to and including termination." (*Id.*) Plaintiff objected to the Written Warning and refused to sign it. Plaintiff never filed an amended NDC in the *Mendez* matter and was ultimately issued a second Written Warning for continuing to exhibit

"insubordinate and willfully disobedient behavior." (Dal Cerro Decl., Ex. V.)[5]

Also on November 20, 2003, Defendant Dal Cerro provided Plaintiff with a written review of Plaintiff's performance for the July 2002 through July 2003 time period (the "Performance Review"). On the whole, the Performance Review was positive, giving Plaintiff an overall rating of "Meets Requirements."[6] However, in the Manager's Comments section, the Review suggested several areas in which Plaintiff might improve. Specifically, it reported that Mr. Konig had had "several antagonistic encounters with various individuals, including his supervisors, a State Bar Court judge, and several opposing counsel." (Dal Cerro Decl., Ex. S.) The original draft of the Performance Review had been prepared by Steedman on

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[5] Mendez was ultimately found guilty on three counts and was sentenced to a one-year stayed suspension and one year of probation instead of the 30 days actual suspension and two years probation requested by the OCTC. On March 23, Blumenthal informed Plaintiff by email that the OCTC had decided not to appeal the discipline meted out in the *Mendez* matter. He said, "Alan: I have to go to a meeting, but I wanted you to know that the office has decided not to appeal the *Mendez* matter. We appreciate your efforts in this case." (Blumenthal Decl., Ex. J.) Konig responded, "Please cease the patronization." Blumenthal replied that he was not being patronizing and Konig sent several emails complaining that management had made the decision not to appeal with no input from him. (*Id.*)

[6] In several areas, Plaintiff was rated "Exceeds Requirements." In all other areas, Plaintiff was rated "Meets Expectations." In no areas was he rated "Needs Improvement."

August 4, 2003. That draft contained the same ratings but was more critical of Plaintiff than the final version. (*Id.*, Ex. F.)

On December 4, Plaintiff submitted a grievance concerning the first Written Warning and the Performance Evaluation. On January 6, Plaintiff, two union representatives, Dal Cerro, Steedman, and Iola Lee-LaMark from Human Resources conducted Step I and Step II grievance proceedings.[7] On January 9, Konig's grievance was rejected. Instead of requesting a Step III hearing (after which, if the issues were not resolved, he could proceed to arbitration), Plaintiff abandoned his grievance. Plaintiff did not file a grievance regarding his second Written Warning.

In early January, the OCTC in San Francisco reorganized into two teams. According to Defendants, the reorganization was designed to promote the filing of more NDCs and reduce case backlog. On each team, two Deputy Trial Counsel were to be responsible for notice drafting and pre-filing settlement, and three Deputy Trial Counsel were to be responsible for handling trials. Plaintiff was reassigned to the notice-drafting team. According to Defendants, Plaintiff was reassigned to "temporarily get [him] out of contested courtroom proceedings, where he had been clashing with both State Bar Court judges and . . . to utilize his skills to help reduce case backlog." (Motion at

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[7] The parties had agreed to consolidate the first two phases of the grievance process into one proceeding.

9:26-10:1.) Plaintiff wanted to keep his trial matters and objected to his reassignment.

Defendants contend that Plaintiff's performance fell short of expectations and his insubordination escalated in the months after his reassignment. For example, Konig refused to follow the OCTC's charging guidelines set forth in the Uniform Charging Standards manual. The policy required that charges not be filed unless the Deputy Trial Counsel has sufficient evidence to meet the clear and convincing burden of proof at trial. Konig sent an email to all Deputy Trial Counsel in the OCTC claiming that the policy was invalid. When he was told he was "required to comply," he refused and sent an email to Defendants Blumenthal, Dal Cerro, and Weiner, asserting that he "cannot legally or ethically follow the 'guidelines.'" (Blumenthal Decl., Ex. O.) He was again instructed to follow the charging standard. He admitted in deposition that he had had no training on the issue and did not discuss the policy with anyone before declaring it "illegal." (Mayorga Decl., Ex. A (Konig Deposition) at 60:8-16, 64:2-23.)

Defendants also contend that in several matters, Plaintiff continued to insubordinately resist instruction from his superiors and to be confrontational with the State Bar Court judges. For example, in the *Medeiros* matter, Blumenthal asked Plaintiff to have a draft NDC in the matter done by March 22. Konig agreed ("no prob") and Blumenthal reminded Konig of the deadline on March 12 and on March 16. In response to the second reminder, Konig replied that he

had not yet been able to complete the draft but would have it done by the end of the week. Blumenthal confirmed that he needed the draft by the originally set due date. In response, Konig sent a thirteen-paragraph email to Blumenthal accusing management of harassing and criticizing him. Among other things, he said, "If I could spend less time distrusting management and supervisors, their motives, and their actions, then I could probably have had the brief done by now." (Blumenthal Decl., Ex. G.) Konig then forwarded the inter-office email exchange to a friend outside the State Bar. Defendants contend that this breached Konig's duties of confidentiality.

Similarly, in the *Lowenstein* matter, Konig provided a draft ENEC statement and NDC to Blumenthal on April 1. Blumenthal gave Konig written comments and questions. Konig rejected Blumenthal's edits and accused management of harassing him, retaliating against him, and engaging in unethical and unlawful conduct. (*Id.*, Ex. P.) Dal Cerro then got involved and told Konig his continuing to be insubordinate for no reason violated his obligation to do as he is told as long as he works for the State Bar. (*Id.*) Konig responded with more accusations that his supervisors were engaging in misconduct. Dal Cerro then removed Plaintiff from the *Lowenstein* matter.

Another example of Plaintiff's insubordination, as described by Defendants, was his conduct in the *Beasley* case. Plaintiff sought to have attorney Beasley disbarred for mistakenly faxing a proof of compliance form to the probation department instead

of to the State Bar Court. At a settlement conference on the matter with Judge McElroy, the Judge commented that Konig was "unreasonable," had "no judgment," and "never [comes] into these things with an open mind." Afterwards, Judge McElroy apologized to Konig for her comments and Konig himself reported that he responded to the apology as follows:

> I told her that it was unnecessary to engage in a personal attack on my character especially in front of a respondent because now the respondent sees that and grabs onto it and uses it in the future to undermine anything I could do in the future. I told her I did not think it proper for a judge who is to be neutral and unbiased to engage in a personal attack against a party or its attorney whether that be the State bar or the respondent. There are ways to express your dissatisfaction but it is not through a manner in which a judge loses the appearance of impartiality and allows her personal feelings to affect her role as an unbiased and neutral arbitrator.

(Dal Cerro Decl., Ex. CC.) On May 18, 2004, Defendant Blumenthal instructed Plaintiff to make three specific changes to the draft NDC in the *Beasley* case. (Blumenthal Decl., Ex. C.) Konig disagreed with the changes and Blumenthal repeated his instruction. Konig refused to comply and again questioned his superiors' judgment and ethics. (*Id.*)

C. Performance Improvement Plan and Notice of Disciplinary Action

On May 19, 2004, Defendant Dal Cerro presented Plaintiff with a Performance Improvement Plan ("PIP") due to "his failure to satisfactorily fulfill the requirements of [his] position." The PIP, to be effective May 24, 2004, through November 24, 2004, stated that it was intended to "serve as a non-disciplinary corrective action program designed to monitor, evaluate and improve [his] performance." The PIP listed past deficiencies in Konig's work and provided specific direction for him to meet with his new team leader, Defendant Blumenthal, on a weekly basis for management oversight. In response, Plaintiff filed a 25-page memorandum challenging the basis of the PIP and contending that it was retaliatory and designed to harass.

On June 14, 2004, Mike Nisperos, Chief Trial Counsel, stated in an email that he intended to terminate Konig's employment when the investigation was complete. (Konig Decl. – Jan., Ex. 45.)

On July 27, 2004, in advance of the next PIP meeting, Blumenthal asked Konig to bring a draft of the pre-trial statement in the *Stevens* matter to the meeting and to be prepared to discuss his trial strategies. At the July 30 PIP meeting, Konig informed Blumenthal that he had not finished taking Stevens' deposition and that the pre-trial statement was not done. When asked about his trial approach, Konig said he did not know what that meant and

refused to respond. Blumenthal instructed Konig to provide a list of witnesses and exhibits, the pre-trial statement, and a short summary of his planned trial approach by August 11, and to be prepared to discuss the matter at the next PIP meeting on August 13. On August 12, Blumenthal had not yet received the requested documents. He emailed Konig about it and Konig responded, "It is highly unlikely that I can complete a draft pretrial statement by tomorrow morning." (Blumenthal Decl., Ex. W.) On August 18, Dal Cerro held a short PIP meeting with Konig to discuss the *Stevens* matter. Despite an August 25 filing deadline, Konig had not yet finished the pre-trial statement for his supervisors' review. Dal Cerro gave him until August 20 to finalize the statement. Konig did not meet that internal deadline.

On August 24, 2004, Dal Cerro presented Plaintiff with a Notice of Disciplinary Action for his failure to comply with the terms of the PIP. Specifically, the Notice identified Konig's failure to provide drafts of the *Stevens* pre-trial statement as requested. The Notice also informed Plaintiff that he was being removed from the *Stevens* case and from all other court appearances and that he should focus his efforts on improving the productivity of his notice drafting. The Notice explained that as a result of Plaintiff's insubordination, a three-day suspension would be imposed, and that the Notice served as a final warning that any further misbehavior could result in termination. The Notice explained, however, that the suspension would be stayed until a later date when

the OCTC was less busy and Plaintiff could be spared.

The next day, Plaintiff took a voluntary leave of absence and remained on leave until he resigned, by email, on October 27, 2004. The three-day suspension was never imposed.

D. Plaintiff's Complaint

Plaintiff asserts a cause of action against Defendants Dal Cerro, Weiner, Blumenthal, and Hawley under 42 U.S.C. § 1983. Plaintiff alleges that Defendants retaliated against him for exercising his First Amendment right to free speech.[8] Specifically, Plaintiff alleges that after he began complaining about the improper conduct of the State Bar Court, Defendants engaged in a continuous and pervasive campaign of retaliation and harassment directed at Plaintiff. This harassment included: (1) the thwarting of Plaintiff's filing and service of the *Kay/Dalton* NDC on October 21, 2003, without Plaintiff ever having been told that there was any problem with his handling of the case, and the eventual reassignment of the case without explanation; (2) the October 31, 2003, Dal Cerro/

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[8] Plaintiff's Complaint also included a second cause of action alleging a denial of due process in violation of his Fourteenth Amendment rights. However, in its April 6, 2005 Order, the Court granted partial summary judgment in Defendant's favor on Plaintiff's due process claim. The First Amendment claim, addressed by Defendants' present motion, is the only remaining claim.

Hawley memorandum which, according to Plaintiff, contained vague allegations of misconduct that were unwarranted; and (3) throughout the ensuing year, constant unwarranted criticism; harassment; removal from cases without justification; punitive reassignment; false performance evaluations; false written reprimands; a baseless performance improvement plan; continuous badgering; acts that undermined and sabotaged Plaintiff's work and ability to perform; disparate treatment; unwarranted suspension; and interference with his attempts to report the retaliatory acts to the appropriate government bodies. Plaintiff also claims that he was constructively discharged on October 27, 2004, and that that discharge was Defendants' final act of retaliation.

Defendants now move for partial summary judgment on Plaintiff's First Amendment claim.

LEGAL STANDARD

The summary judgment procedure is a method for promptly disposing of actions. *See* FED. R. CIV. P. 56. The judgment sought will be granted if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "[A] moving party without the ultimate burden of persuasion at trial [ ] may carry its initial burden of production by either of two methods. The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving

party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Companies,* 210 F.3d 1099, 1102 (9th Cir. 2000). If the movant meets its burden, the nonmoving party must come forward with specific facts demonstrating a genuine factual issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In opposing summary judgment, the nonmoving party may not rest on his pleadings. He "must produce at least some 'significant probative evidence tending to support the complaint.'" *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987) (quoting *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 290 (1968)).

The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in the light most favorable to the non-moving party. *See T.W. Elec. Serv., Inc.,* 809 F.2d at 630-31 (citing *Matsushita,* 475 U.S. at 587). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts. . . ." *Hollingsworth*

Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980).

ANALYSIS

Defendants contend that Plaintiff has presented no evidence creating a triable issue of fact on his claim that they unlawfully retaliated against Plaintiff for his exercise of protected speech. Defendants argue that even if the Court disagrees, they are entitled to qualified immunity because Plaintiff's rights were not violated, his alleged rights were not clearly established, and a reasonable supervisor in each Defendant's position would have believed his respective conduct was lawful. The Court examines these arguments separately.

I. Standard Governing Plaintiff's First Amendment Claim[9]

"In order to state a claim against a government employer for violation of the First Amendment, an employee must show (1) that he or she engaged in protected speech; (2) that the employer took 'adverse employment action;' and (3) that his or her speech was a 'substantial or motivating' factor for the adverse

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[9] The Court agrees with Defendants that *Connick v. Meyers,* 461 U.S. 138 (1983), and its progeny, and not cases dealing with disclosures of criminal wrongdoing such as *Huford v. McEnaney,* 249 F.3d 1142 (9th Cir. 2001), dictate the outcome of Plaintiff's retaliation claim.

employment action." *Coszalter v. City of Salem,* 320 F.3d 968, 973 (9th Cir. 2002). Under the balancing test established by *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968), the court must weigh the employer's legitimate interest in promoting workplace efficiency and avoiding workplace disruption against the employee's interest in exercising his First Amendment rights, or that, under the mixed motive analysis established by *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1977), the employer would have taken the same adverse actions in the absence of the employee's protected conduct. *See Bd. of County Comm'rs v. Umbehr,* 518 U.S. 668, 675-76 (1996). The *Pickering* balancing test can be employed even at the first step of determining whether the speech at issue is protected.

Here, Defendants contend that Plaintiff, a public employee, did not engage in speech that is protected by the Constitution. Defendants argue that even if the speech at issue is protected, their treatment of Plaintiff, about which he now complains, was motivated not by retaliation for engaging in the protected speech, but by Defendants' interest in preventing further insubordination and disruption in the OCTC, which outweighed Plaintiff's First Amendment interests. They also contend that they would have taken the very same actions whether or not he had engaged in the allegedly protected conduct. The Court first examines whether the speech at issue was protected.

A. Plaintiff Engaged in Protected Speech.

Plaintiff contends that the following communications were constitutionally protected: (1) statements of intent to seek redress from CJP; (2) the September 11, 2003, memorandum; (3) Plaintiff's complaint to the CJP; (4) the November 18, 2003, memorandum; (5) Plaintiff's statement of intent to seek redress from RAD and the Legislature; (6) Plaintiff's reports to RAD and the Legislature; (7) Plaintiff's report to the State Personnel Board; and (8) Plaintiff's refusals to comply with supervisor directives that he believed would have resulted in ethical and legal violations.

"An employee's speech is protected under the First Amendment if it addresses 'a matter of legitimate public concern.'" *Coszalter,* 320 F.3d at 973 (quoting *Pickering,* 391 U.S. at 571); *see also Connick v. Myers,* 461 U.S. 138, 149-50 (1983). "[S]peech that concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Coszalter,* 320 F.3d at 973 (quoting *McKinley v. City of Eloy,* 705 F.2d 1110, 1114 (9th Cir. 1983)). "On the other hand, speech that deals with 'individual personnel disputes and grievances' and that would be of 'no relevance to the public's evaluation of the performance of governmental agencies' is generally not of 'public concern.'" *Id.*; *see also Weeks v. Bayer,* 246 F.3d 1231, 1235 (9th Cir. 2001) (the First Amendment "does not safeguard 'purely private interest,' 'individual disputes,' or 'the minutiae of

workplace grievances.'") "The determination of whether an employee's speech deals with an issue of public concern is to be made with reference to 'the content, form, and context' of the speech." *Coszalter,* 320 F.3d at 973-74 (citing *Allen v. Scribner,* 812 F.2d 426, 430 (9th Cir. 1987)).

Here, Defendants argue that the speech at issue consists of workplace gripes and is not protected by the First Amendment. The Court does not entirely agree. Defendants are right that the record is replete with Plaintiff's personal complaints, mostly by email, in which he complains about Defendants' micro-management, disrespect, and lack of support of him. This type of personal workplace grousing does not raise matters of public concern. *See, e.g., Connick,* 461 U.S. at 148 (morale in the district attorney's office was not an issue of public concern). However, Plaintiff did, on several occasions, engage in speech that touched on matters of public concern. Plaintiff's communications in which he expressed concerns, either internally or to the CJP, the state Legislature, the Board of Governors' RAD committee, or the State Personnel Board, about judicial misconduct at the State Bar Court, were protected by the First Amendment. The appropriate functioning of the judicial forum in which attorneys are tried for wrongdoing is of vital concern to the public.[10] Whether or not Plaintiff's

[10] Whether or not Defendants knew about the CJP complaint and took adverse employment action against Plaintiff in retaliation is a separate question and is discussed *infra.*

concerns were well-founded is irrelevant. Thus, the Court finds that the following communications, occurring between approximately May 2003 and November 2003, were protected by the First Amendment: (1) statements of intent to seek redress from CJP; (2) Plaintiff's complaint to the CJP; (3) Plaintiff's statement of intent to seek redress from RAD and the California Legislature; (4) Plaintiff's reports to RAD and the Legislature; (5) Plaintiff's report to the State Personnel Board.

More complex questions, however, are presented by Plaintiff's September 11, 2003, and November 18, 2003, internal memoranda, and his repeated refusals, between January 2004 and August 2004, to comply with his supervisors' directives because he believed that to do so would have resulted in ethical and legal violations. The Court examines each of these separately.

1. The September 11, 2003 Memorandum

Defendants' position is that Plaintiff's September 11, 2003, memorandum is a workplace gripe about the lack of support and morale at the OCTC that does not constitute speech that is protected by the First Amendment. Plaintiff contends, to the contrary, that because the memo addresses, at least in part, concerns about the State Bar Court judges' conduct, fairness, and propriety – matters of public concern,

the entire memorandum constitutes protected speech. The Court agrees with Plaintiff here.

At the outset, the Court notes that Defendants are right that Plaintiff's speech should be considered not "in a vacuum, but in conjunction with the manner, time, and place of the public employee's expression and the context in which the dispute arose." *Poole v. VanRheen,* 297 F.3d 899, 908 (9th Cir. 2002). Here, there is no doubt that Plaintiff's September memorandum was written primarily to express his great personal anguish about what he perceived was his supervisors' increasing lack of respect for and trust in him professionally. He felt undermined and patronized, and was dispirited. This sense that he was being treated unfairly is interwoven throughout the memo and constitutes its overarching theme. Defendants argue, therefore, that the memorandum, as expression of workplace grousing, is not protected speech.

However, "[i]f some part of the communication addresses an issue of public concern, the First Amendment's protections are triggered even though other aspects of the communication do not qualify as a public concern." *Hyland v. Wonder,* 972 F.2d 1129, 1137 (9th Cir. 1992). At issue in *Hyland* was whether a memorandum written by a Juvenile Hall employee (against whom adverse action was taken) and distributed to judges constituted protected speech. The memorandum accused the current director of Juvenile Hall of incompetence, described a precipitous decline in staff morale, accountability, and leadership,

and cited problems with the living conditions at Juvenile Hall and the treatment of the children detained there. *Id.* The court, citing its earlier holding in *Roth v. Veteran's Administration,* 856 F.2d 1401, 1405 (9th Cir. 1988), held that speech regarding "'the misuse of public funds, wastefulness, and inefficiency in managing and operating government entities' qualifies as a matter of public concern." *Id.* The *Hyland* plaintiff's memorandum alleged the "inept, inefficient, and potentially harmful administration of a government entity." *Id.* at 1139. Thus, the court found, the memorandum spoke to a matter of public concern. The court rejected the defendant's argument that the speech concerned only an internal personnel dispute, finding that the "context in which the memorandum was drafted and circulated suggested" otherwise. *Id.* at 1138 (citations omitted).

Plaintiff contends that his September 2003 memorandum is analogous to the memo at issue in *Hyland.* The Court disagrees. Here, the thrust of Plaintiff's memorandum, unlike the memo at issue in *Hyland,* was Plaintiff's own personal dissatisfaction with his supervisors and their lack of support for him, as exemplified by the following excerpts:

> I am still speechless when I look back at these hearings and still appalled at the lack of support and lack of backing I received from this office while enduring the erroneous rulings, inappropriate comments, unlawful orders, disregard of due process, and outright bias of Judge Remke.

(*Id.* at 1.)

> I cannot believe this office refuses to support its trial counsel and defend their integrity when inappropriately attacked by a judge without basis. I cannot understand why so much deference is given to a judge here merely because there is a fear of conflict between this office and a judge despite the judge's behavior and actions lacking in judicial temperament [sic] and the judge's rulings disregarding and contradicting Supreme Court authority and Review Department authority.

(*Id.* at 1-2).

> In no other organization that I have worked [sic] have I ever seen senior attorneys or management refuse to back their trial attorneys when inappropriately disparaged or attacked by the judiciary.

(*Id.* at 2.) However, this difference between Plaintiff's memo and the *Hyland* memo is not dispositive. Plaintiff's memo touched on matters of public concern by incorporating accusations that one of the State Bar Court judges was bias and had engaged in repeated misconduct and by asserting that Plaintiff "truly and sincerely now question[s] the mission of [the OCTC] and its commitment to its obligation to protect the public, the administration of justice, and former clients." (Dal Cerro Decl., Ex. G at 3.) Judicial misconduct and the proper administration of a government agency are issues of public concern. In the memorandum, those issues are inextricably intertwined with Plaintiff's expression of workplace

dissatisfaction. Accordingly, while the Court disagrees with Plaintiff that the memo is comparable to the *Hyland* memo, the Court finds that the portions of the September 11, 2003, memorandum that raise matters of public concern trigger the First Amendment's protection and render the entire memorandum protected speech.

Defendants contend that even if the Court finds that the memorandum is protected speech by virtue of those aspects of the memo that touch on matters of public concern, Konig's speech, in the September 2003 memorandum, so severely damages office harmony and working relationships that the Government's interest in promoting a congenial workplace outweighs Plaintiff's First Amendment rights under *Pickering* and the memo should not be deemed protected speech. The Court disagrees. To so find would require a finding that the memorandum disrupted coworker relationships, impaired discipline or control by superiors, eroded close working relationships, interfered with performance of duties, or obstructed the routine operation of the office. On this record, the Court cannot find as a matter of law that Plaintiff's memo was so insubordinate or disruptive to the management of the OCTC that it falls outside the protection of the First Amendment. Plaintiff's September 11, 2003, memorandum is protected speech.

2. The November 18, 2003 Memorandum

Plaintiff's November 18, 2003, memorandum, a defensive reply to Dal Cerro's October 2003 response to the September memorandum, incorporates the September memo. Specifically, Plaintiff criticizes Defendants' failure to address the issues set forth in his September 11 memorandum, which he attached thereto. As discussed above, some of the issues raised in the September memo were of public concern, rendering that memo protected speech. Thus, the November memo must also be deemed protected speech.

3. Plaintiff's Refusals to Comply With Directives That He Believed Would Have Resulted in Ethical and Legal Violations

Plaintiff contends that his recurring refusals to follow his supervisors' instructions constituted protected speech because he believed if he complied with their directives, he, himself, would be violating the law and the code of ethics. Plaintiff cites a California Supreme Court case – *General Dynamics Corp. v. Superior Court,* 7 Cal. 4th 1164 (1994) – to support his argument. In that case, an in-house attorney alleged that he was terminated in retaliation for spearheading an investigation into company-wide drug use, protesting the company's failure to investigate the criminal bugging of the office of the chief of security, and advising the company that its salary

policy might violate federal labor law. The court held that a terminated in-house attorney can sue his former employer for retaliating against him for raising legitimate legal and ethical concerns. However, the court was explicit that the "contested ethical requirement must be clearly established by the ethics code or statutory provision" and "disagreements over policy are not actionable." *Id.* at 1189-91. In the case at bar, Plaintiff has provided no evidence that his refusal to follow instructions by, *inter alia,* dropping certain charges from NDCs or making routine edits to his drafts would have violated clearly established ethics provisions or law. Accordingly, the Court finds that Plaintiff has not demonstrated that this speech was protected.

In sum, the Court finds that Plaintiff's stated intention to seek redress from the CJP, RAD, and the California Legislature beginning in May 2003, his complaints to those bodies and to the State Personnel Board in November and December 2003, and his internal complaints, in September and November 2003, about judicial misconduct and the poor administration of the OCTC, constituted protected speech.

B. Adverse Employment Actions

An adverse employment action is an action that is "reasonably likely to deter" the employee from engaging in protected speech. *Coszalter,* 320 F.3d at 976. "To constitute an adverse employment action, a government act of retaliation need not be severe and

it need not be of a certain kind. Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden." *Id.* at 975. "In some cases, the would-be retaliatory action is so insignificant that it does not deter the exercise of First Amendment rights, and thus does not constitute an adverse employment action within the meaning of the First Amendment retaliation cases." *Id.*; *see also Nunez v. City of Los Angeles,* 147 F.3d 867 (9th Cir. 1987) ("bad-mouthing" an employee who engaged in protected speech is not an adverse employment action). In *Coszalter,* the Ninth Circuit held that a whole host of employer conduct, including assigning an employee to new duties, conducting an unwarranted disciplinary investigation, ongoing verbal harassment and humiliation, suspending the employee from work, threatening disciplinary action, withholding customary public recognition, and special reviews of work quality, when taken together, amounted to "a severe and sustained campaign of employer retaliation that was 'reasonably likely to deter' plaintiffs from engaging in speech protected under the First Amendment." 320 F.3d at 976-77.[11]

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[11] The court in *Coszalter* addresses whether the defendant's conduct amounted to adverse actions and whether those actions were motivated by the plaintiff's protected speech together. This Court will address these issues separately. Defendants' adverse employment action only constitutes retaliation if Plaintiff can demonstrate that it was if motivated by Plaintiff's protected speech. The causation issue is addressed in the next section.

Here, Plaintiff alleges that Defendants took the following adverse actions against him: (1) harassing and humiliating Plaintiff both verbally and in writing; (2) micro-managing Plaintiff's work; (3) sabotaging Plaintiff's work; (4) bad-mouthing Plaintiff; (5) withholding positive comments about Plaintiff's work; (6) issuing false written reprimands in November and December 2003; (7) conducting biased grievance proceedings; (8) retaining a biased investigator to look into Plaintiff's RAD complaint; (9) reassigning Plaintiff in December 2003/January 2004 to new job responsibilities; (10) conducting unwarranted disciplinary investigations; (11) failing to fully investigate allegations against him by speaking with witnesses who would refute the allegations; (12) threatening disciplinary action; (13) removing Plaintiff from matters on which he was working; (14) imposing the PIP in the summer of 2004; (15) imposing the three-day suspension in August 2004; (16) constructively terminating Plaintiff's employment.[12] Plaintiff contends that Defendants' treatment of him was, like the actions at issue in *Coszalter*, a severe and sustained campaign of conduct that was reasonably likely to deter him from engaging in any further protected speech. The Court addresses, under the *Coszalter*

[12] This list is gleaned from Plaintiff's less comprehensible list on pages 12 and 13 of his opposition.

standard, whether each Defendant's actions against Plaintiff amounted to an adverse action.[13]

1. Defendant Dal Cerro

According to Plaintiff, the following actions taken by Defendant Dal Cerro constitute adverse employment actions:

- On September 23, 2003, Defendant Dal Cerro and Donald Steedman (not a defendant here) met with Plaintiff and a union representative. At that meeting, Dal Cerro allegedly made several false allegations against Plaintiff related to his work and his conduct.
- On October 31, 2003, Dal Cerro delivered a memorandum that he and Defendant Hawley had prepared in response to Plaintiff's September 11, 2003, memorandum. According to Plaintiff, the response contained numerous vague and unwarranted allegations of misconduct against Plaintiff and included a "veiled threat that [Konig] either accept the way things are done and stop

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[13] The Court notes that Plaintiff does not separately analyze each Defendant's actions against him. However, to survive summary judgment on his claims against each Defendant, he must present evidence that each Defendant took an adverse action against him in retaliation for protected speech. *See Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989) (no vicarious liability under § 1983). Accordingly, the Court separates out by Defendant, as best it can, the conduct Plaintiff alleges amounted to adverse action against him.

raising issues of wrongdoing and malfeasance or [he] would no longer have a job."

- In November 2003, Defendant Dal Cerro reassigned the *Kay/Dalton* matter to Blumenthal.
- On November 20, 2003, Dal Cerro and Steedman presented Plaintiff with a Written Warning, explaining that Konig had insubordinately failed to make changes to a draft NDC which had been requested by his supervisor and that he then denied being instructed to make those changes. The Warning admonished Plaintiff that if he "continue[d] to fail to follow the direction of [his] supervisors or otherwise engage[d] in acts of insubordination, disobedience, or disrespect, [he would] be subject to additional discipline, up to and including termination."
- Also on November 20, 2003, Defendant Dal Cerro provided Plaintiff with his Performance Review for the July 2002 through July 2003 time period. On the whole, the Performance Review was positive, giving Plaintiff an overall rating of "Meets Requirements." However, in the Manager's Comments section, the Review suggested several areas in which Plaintiff might improve. Specifically, it reported that Konig had had "several antagonistic encounters with various individuals, including his supervisors, a State Bar Court judge, and several opposing counsel."
- In December 2003, Dal Cerro issued Plaintiff a second Written Warning for continuing to exhibit "insubordinate and willfully disobedient behavior."

- In April 2004, following a battle between Plaintiff and Defendant Blumenthal over Blumenthal's edits and suggestions for Plaintiff's draft NDC in the *Lowenstein* matter, Dal Cerro got involved and told Konig that continuing to be insubordinate for no reason violated Plaintiff's obligation to do as he is told as long as he works for the State Bar. Ultimately, Dal Cerro removed Plaintiff from the *Lowenstein* matter.

- On May 19, 2004, Defendant Dal Cerro presented Plaintiff with a PIP due to Plaintiff's "failure to satisfactorily fulfill the requirements of [his] position." The PIP stated that it was intended to "serve as a non-disciplinary corrective action program designed to monitor, evaluate and improve [Plaintiff's] performance." The PIP listed past deficiencies in Konig's work and provided specific direction for him to meet with his new team leader, Defendant Blumenthal, on a weekly basis for management oversight.

- On August 18, 2004, Dal Cerro held a short PIP meeting with Konig to discuss Plaintiff's ability to meet deadlines in the *Stevens* matter.

- On August 24, 2004, Dal Cerro presented Plaintiff with a Notice of Disciplinary Action for his failure to comply with the terms of the PIP. Specifically, the Notice identified Konig's failure to provide drafts of the *Stevens* pre-trial statement as requested. The Notice also informed Plaintiff that he was being removed from the *Stevens* case and from all other court appearances and that he should focus his efforts on improving the productivity of his notice drafting. The Notice explained

> that as a result of Plaintiff's insubordination, a three-day suspension would be imposed, and that the Notice served as a final warning that any further misbehavior could result in termination. The Notice explained that the suspension would be stayed until a later date when the OCTC was less busy and Plaintiff could be spared.

Under *Coszalter,* the Court finds that Defendant Dal Cerro's reassignment of Plaintiff's cases and issuance of two Written Warnings, a PIP, and a Notice of Disciplinary Action constitute adverse employment actions. If undertaken in response to Plaintiff's protected speech,[14] these actions were reasonably likely to deter Plaintiff from engaging in further protected speech. To avoid summary judgment, however, Plaintiff must demonstrate that his protected conduct was a substantial or motivating factor for Defendant Dal Cerro's adverse actions. That question is addressed in section 3(c), *infra.*

2. Defendant Blumenthal

Plaintiff claims that the following actions taken by Defendant Blumenthal constitute adverse employment actions:

- On March 23, 2004, Blumenthal informed Plaintiff by email that the OCTC had decided not to appeal the discipline meted out in the *Mendez*

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[14] Again, the Court addresses Defendants' motivation for taking adverse action in the next section.

matter. He said, "Alan: I have to go to a meeting, but I wanted you to know that the office has decided not to appeal the *Mendez* matter. We appreciate your efforts in this case." Konig interpreted the email as patronizing and alleges that it was an adverse action against him to make the decision not to appeal with no input from him.

- In the *Medeiros* matter, Blumenthal asked Plaintiff to have a draft NDC done by March 22, 2004. Blumenthal then reminded Konig of the deadline on March 12 and again on March 16. Plaintiff alleges that Blumenthal was unduly harassing, criticizing, and micro-managing him.

- In the *Lowenstein* matter, Konig provided a draft ENEC statement and NDC to Blumenthal on April 1, 2004. Blumenthal gave Konig written comments and questions which Konig alleges amounted to harassment and retaliation.

- On May 18, 2004, Defendant Blumenthal instructed Plaintiff to make three specific changes to the draft NDC in the *Beasley* matter. Plaintiff contends that this was more micro-management and harassment.

- On July 27, 2004, in advance of the next PIP meeting (scheduled for July 30), Blumenthal asked Konig to bring a draft of his pre-trial statement in the *Stevens* matter to the meeting and to be prepared to discuss his trial strategies. At the July 30 PIP meeting, Konig informed Blumenthal that he had not finished taking Stevens' deposition and that the pre-trial statement was not done. When asked about his trial

> approach, Konig said he did not know what that meant and refused to respond. Blumenthal then instructed Konig to provide a list of witnesses and exhibits, the pre-trial statement, and a short summary of his planned trial approach by August 11, and to be prepared to discuss the matter at the next PIP meeting on August 13. On August 12, Blumenthal had not yet received the documents. He emailed Konig about it. Konig alleges that Blumenthal's conduct around the *Stevens* matter amounted to micro-management and harassment.

Defendant Blumenthal's attempts to supervise Plaintiff by checking in with him about trial strategy and deadlines, and by providing edits and suggestions to drafts may amount to adverse actions. Plaintiff, generally asserts that Defendant Blumenthal's attempts to supervise Plaintiff by checking in with him about trial strategy and deadlines, and by providing edits and suggestions to constitute adverse actions. Defendant argues that Plaintiff has failed to demonstrate how Blumenthal's supervisory behavior was reasonably likely to deter Plaintiff from speaking out about judicial misconduct at the State Bar Court. The court finds on this record that it is a close question as to whether Plaintiff has presented sufficient evidence to establish a genuine factual dispute regarding whether Blumenthal's conduct constitutes an adverse action. Assuming, without finding, that Plaintiff has established that Blumenthal's conduct constitutes an adverse action, to avoid summary judgment Plaintiff must establish that Blumenthal's actions were

undertaken in retaliation for Plaintiff's protected speech. This issue is addressed in section 3(c), *infra*.

3. Defendant Hawley

Plaintiff alleges that Defendant Hawley manipulated the internal investigation into Plaintiff's RAD complaint in November and December 2003 and that that manipulation constituted an adverse action against him. Plaintiff alleges that one day before Konig sent his complaint to RAD – the committee that oversees the OCTC, Hawley emailed John Van de Kamp, RAD's Chair, to discuss Konig's forthcoming complaint. According to Plaintiff, Defendant Hawley suggested to RAD how Plaintiff's complaint should be dealt with and hired an investigator – Charlotte Addington – who was purported to be independent but who Plaintiff alleges was not independent, to look into Plaintiff's claims. Plaintiff also claims that Hawley made prejudicial statements about Plaintiff in the email to Van de Kamp. Plaintiff also alleges that Defendant Hawley wrote to the legislative committees to which Konig had complained, and represented that Mr. Van de Kamp was directing an appropriate investigation into Konig's complaints. Plaintiff asserts that this, too, amounted to an adverse action. Finally, Plaintiff claims that the October 2003 memorandum prepared by Defendants Dal Cerro and Hawley in response to Plaintiff's September 2003 memo contained numerous vague and unwarranted allegations of misconduct against Plaintiff and included a "veiled threat that [Konig]

either accept the way things are done and stop raising issues of wrongdoing and malfeasance or [he] would no longer have a job," amounting to adverse action.

With respect to the RAD investigation, the Court finds that Plaintiff has not presented any evidence that Defendant Hawley's role in that investigation was improper or that he manipulated the investigation in the OCTC's favor such that it could constitute an adverse employment action. It may be true that where an employee complains about his organization to its supervisory board and the board's investigation of the complaint is rigged by the employee's manager to result in a positive outcome for the organization, the manager's manipulative conduct may be reasonably likely to deter the employee from complaining again. The employee presumably would not bother to file a complaint because he would know that the complaint would not be taken seriously. But Plaintiff has not shown this to be the case here. Here, Plaintiff has not presented any evidence to support a finding that Defendant Hawley's email to Van de Kamp suggests that he was manipulating the investigative process. The email, attached to Plaintiff's April 5, 2005, Declaration as Exhibit 16, only alerts Van de Kamp that Konig's complaint will be filed soon, presents the OCTC's side of the story and its current battle with Konig over his refusal to follow his superiors' directives, and suggests that he will contact Charlotte Addington, an investigator with whom he had worked in the past, to investigate the complaint.

There is no suggestion, in that email, that Defendant Hawley intended to manipulate the findings in his (or the OCTC's) favor. Similarly, Plaintiff presents no evidence that Ms. Addington was in any way instructed by Hawley to manipulate the investigation in the OCTC's favor. Her notes, upon which Plaintiff heavily relies here, say only that Konig is likely to question her role. This, alone, does not suggest that her role was questionable or, more to the point, that Hawley was rigging the investigation. Accordingly, the Court finds, after a very careful examination of the record, here, that Plaintiff has not created a triable issue of fact with respect to whether Hawley's role in the RAD investigation was an adverse action.

With respect to Hawley's alleged letters to CJP, to the California State Personnel Board, and to the California Senate and Assembly Judiciary Committees, to whom Plaintiff had submitted written complaints, Plaintiff provides no evidence that Hawley actually wrote letters to CJP or to the legislative committees. Plaintiff does provide evidence, and Defendants admit, that Hawley wrote a letter to the State Personnel Board, informing the Board, correctly, that it did not have jurisdiction over the State Bar (and the Board agreed and did not pursue Plaintiff's complaint). The Court finds that this act does not constitute an adverse action against Plaintiff.

Finally, with respect to the memorandum prepared by Defendants Hawley and Dal Cerro in response to Plaintiff's September memo, the Court finds that that there was no adverse action. Plaintiff

has presented no evidence that the responsive memo was disciplinary in nature nor has he presented any evidence demonstrating that the memo, which specifically addressed Plaintiff's insubordination, would be reasonably likely to deter him from engaging in protected speech. Accordingly, under *Coszalter,* the Court finds that the memorandum written by Hawley and Dal Cerro does not, alone, constitute an adverse action.

4. Defendant Weiner

Plaintiff makes no specific allegations of adverse employment actions taken against him by Defendant Weiner. Instead, Weiner is mentioned in passing as one of the supervisors who directed Plaintiff to conform his practice to the guidelines set by the OCTC. Plaintiff refused to do so on the ground that the guidelines were unethical; however, he points to no evidence that would support a finding that this instruction amounted to an adverse action reasonably likely to deter Plaintiff from engaging in protected speech.

5. Generalized Allegations of Adverse Action – No Identified Actor

Plaintiff alleges that the decision, in January 2004, to reassign him to the team designated to draft notices (and away from the trial team), constituted an adverse action taken against him by Defendants. Plaintiff does not name a specific actor. The evidence

in the record demonstrates that the entire office was reorganized such that some counsel were assigned to notice drafting and others were assigned to trial work, and that the reassignment was not unique to Plaintiff. However, the decision to assign Plaintiff to notice drafting and to take him off of his cases was, even if not unique to Plaintiff and even if justified by Defendants (a question that the Court will examine in the next section), an adverse action against Plaintiff that might be likely to deter him from further engaging in protected speech.

In sum, the Court finds that the following actions taken against Plaintiff were adverse: Defendant Dal Cerro's issuance of Written Warnings, the PIP, and the Notice of Disciplinary Action, as well as the removal of Plaintiff from various matters on which he was working (e.g. *Kay/Dalton, Lowenstein, Stevens);* Defendant Blumenthal's alleged micro-management of Plaintiff from January 2004 through August 2004; Plaintiff's reassignment to notice drafting in January 2004; and the decision, in August 2004, to discipline Plaintiff by suspending him. Because Plaintiff has not presented any evidence that Defendant Weiner took an adverse action against Plaintiff, the Court **GRANTS** Defendants' motion for summary judgment as to the claims against Defendant Weiner.

C. Plaintiff Has Not Demonstrated that His Protected Speech Was a Substantial or Motivating Factor For Defendants' Adverse Employment Actions.

Plaintiff argues that Defendants[15] took adverse action against him in retaliation for engaging in protected speech. Defendants contend, to the contrary, that each action Plaintiff contends was retaliatory was actually disciplinary in nature and was prompted, in each instance, by Plaintiff's insubordination and refusal to be supervised, not by his protected speech. Defendants also contend that even assuming Plaintiff has shown that his protected speech was a substantial or motivating factor for the adverse actions taken against him, the same decisions would have been reached in the absence of any protected conduct. The Court agrees with Defendants.[16]

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[15] Having dismissed Defendant Weiner, the term "Defendants" as used in the remainder of this Order refers only to Defendants Dal Cerro, Blumenthal, and Hawley.

[16] In his opposition, Plaintiff does not analyze the question of motive separately for each Defendant and instead makes very generalized contentions about retaliatory motive. For example, Plaintiff appears to argue, as will be discussed *infra*, that the log of Plaintiff's conduct maintained by Defendant Blumenthal demonstrates that *all* Defendants' adverse conduct against Plaintiff was motivated by retaliation. He does not specifically tether the log to *Blumenthal's* actions. While the Court found it useful, in section I(B) above, to break out by Defendant the various actions Plaintiff alleged constituted adverse employment actions, the Court declines to follow that pattern here.

A plaintiff can show that retaliation was a substantial or motivating factor behind a defendant's adverse employment actions in three different ways. *Coszalter,* 320 F.3d at 977 (citing *Keyser v. Sacramento City Unified Sch. District,* 265 F.3d 741 (9th Cir. 2000)). First, a plaintiff can point to evidence demonstrating that the proximity in time between the protected action and the allegedly retaliatory employment decision could prompt a jury logically to infer that the plaintiff was terminated in retaliation for his speech. Second, a plaintiff can point to evidence that his employer expressed opposition to his speech, either to the plaintiff or to others. Third, a plaintiff can point to evidence that his employer's proffered explanations for the adverse employment action were false and pre-textual. *Id.* Here, Plaintiff argues that he has submitted evidence demonstrating that he has made a *prima facie* case for retaliation and that he has shown that Defendants' proffered justifications for their adverse employment actions are actually a pretext for a retaliatory motive.

1. Expressed Opposition

Plaintiff contends that various communications from Defendants constituted expressed opposition to his attempts to engage in protected speech such that he has established a *prima facie* case of retaliation. Specifically, Plaintiff suggests that Defendant Dal Cerro's advice to Plaintiff not to file a complaint with CJP because CJP "won't do anything" anyway and Dal Cerro's personal notes suggesting that Plaintiff

should not make reports of judicial misconduct to outside agencies without first discussing it with his supervisors amounts to opposition that supports a finding that the actions Dal Cerro took were motivated by retaliation. Plaintiff fails, however, to cite to any competent evidence in the record establishing that Dal Cerro made the dissuasive comment or wrote the note.[17] Assuming evidence of this conduct

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[17] In neither his Opposition nor in the supplemental brief he filed providing citations to the record (that were utterly lacking in his original Opposition) does Plaintiff cite to anything in the record that supports the portion of his opposition claiming that during the spring and summer of 2003, "when Plaintiff stated his intent to notify the CJP of judicial misconduct within the State Bar, Defendant Dal Cerro repeatedly attempted to dissuade or discourage Plaintiff from doing so by stating to him words to the effect of 'you don't want to do that,' and that the CJP 'won't do anything' anyway." (*See* Opposition at 18:2-5; Plaintiff's Response to Evidence Interposed by Defendants.) Plaintiff also fails to provide evidentiary support for his contention that, "In Defendant Dal Cerro's notes from his meetings with Plaintiff on September 23 and 24, he has made specific references to Plaintiff making reports of internal misconduct to outside agencies and notes to the effect that Plaintiff was not to make such reports without first obtaining the approval of his supervisors." (*See* Opposition at 18:6-9; Plaintiff's Response to Evidence Interposed by Defendants at 3:24-25.) Plaintiff did provide citations to the record to support that statement (in his supplemental brief), but neither citation actually supports Plaintiff's claims. First, Plaintiff cites to a portion of his own declaration, which says nothing about Dal Cerro's alleged notes suggesting that Plaintiff discuss possible CJP complaints with supervisors before making them (*see* Plaintiff's April 5, 2005, Declaration at 14-15). Second, he cites to Exhibit 16 to his April 5, 2005, Declaration, which is an email from Defendant Robert Hawley to RAD that says nothing about Dal Cerro's notes

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were before the Court, Dal Cerro's comments might suffice to support Plaintiff's *prima facie* case, as to Defendant Dal Cerro, of retaliation here. With no evidentiary support, however, Plaintiff has not shown that Dal Cerro expressed opposition to his protected speech.

Plaintiff's second example of "expressed opposition" fairs no better than the first. He contends that the first Written Warning he received, just 17 days after he submitted his complaint to the CJP, contained the following directive regarding "corrective action to be taken:"

> You will seek and receive the approval of your team leader (or his designee) as to final form and content of each of your pleadings before they are filed, and other written documents related to your cases and other assigned tasks directed to individuals outside of the Office of the Chief Trial Counsel before they are sent.

(Dal Cerro Decl., Ex. Q.) Plaintiff contends that the "plain language of this directive, without any attempt to distinguish between purely private speech and that done as an employee of the office, . . . makes the intent of the directive clear. Plaintiff will cease the outside reports." (Opposition at 18:20-23.) The Court

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regarding Plaintiff's CJP complaints. The Court has located nothing else in this very full record to support Plaintiff's factual claims here.

is at a loss as to how Plaintiff or his counsel could reasonably read the language of the Written Warning to suggest that Plaintiff stop filing complaints about judicial misconduct with outside agencies. The directive clearly states that it applies only to "pleadings," "other written documents *related to your cases,*" and "other *assigned* tasks." (Dal Cerro Decl., Ex. Q (emphasis added).) Even a liberal reading of the language would not accommodate the meaning Plaintiff assigns.

2. Temporal Proximity

Plaintiff also contends that the temporal proximity between the protected speech in which he engaged and the adverse actions Defendants took supports, under *Coszalter,* an inference that his speech was a substantial or motivating factor for their actions. It is true that many of Defendants' actions took place not long after Plaintiff engaged in protected speech. For example, Plaintiff filed his CJP complaint in early November and was issued a Written Warning a few weeks later. Defendants argue, however, that the temporal proximity of their actions to the protected conduct does not alone demonstrate retaliatory motive.[18]

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[18] Defendants also contend that they did not all know about all of the complaints Plaintiff had filed; thus, their subsequent actions could not have been taken in retaliation for Plaintiff's complaints of judicial misconduct. While that may be true (and

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Defendant's argument is somewhat persuasive in that Plaintiff has failed to link the discrete acts of harassment committed by each defendant to an instance of protected speech so that the Court could determine whether the record supports an inference than an employment decision was retaliatory. *Coszalter v. City of Salem,* 320 F.3d 968, 977 (9th Cir. 2003). However, the record does evince that several instances of asserted retaliatory conduct took place not long after Plaintiff engaged in protected speech. For example, Plaintiff filed his CJP complaint in early November and was issued a Written Warning a few weeks later. As such, the Court proceeds as if the proximity of the adverse consequences identified herein were sufficient to establish that Defendants acted with the requisite motivation. *Id.*

3. The Government's Proffered Justification and Pretext

Under Ninth Circuit law, Defendant can escape liability by showing that it would have taken the complained of action even in the absence of the protected speech. *Keyser v. Sacramento City Unified*

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the record suggests that it is), the Court is not persuaded that this absolves Defendants here. If each Defendant was aware that Plaintiff had raised issues regarding judicial decorum with outside agencies, it is irrelevant that each did not know of every instance of protected communication. That each knew he had engaged at all in protected speech provides a basis for retaliation.

School Dist., 265 F.3d 741, 750 (9th Cir. 2000). Assuming, without deciding, that Plaintiff has established *a prima facie* case of retaliation here by demonstrating temporal proximity, the Court now examines the justifications for the adverse employment actions proffered by Defendants and whether Plaintiff has presented any evidence to support a finding that the neutral justifications are actually pretext for retaliation.

Defendants contend that each disciplinary action taken against Plaintiff was actually meted out in response to Plaintiff's acts of insubordination, and not in retaliation for Plaintiff's engaging in protected speech. For example, Defendant Dal Cerro's reaction to the September 11, 2003, memo was to call a meeting with Plaintiff, twelve days afterwards, to counsel him on improving his honey-to-vinegar ratio at the office. Defendants contend that Dal Cerro merely responded, at that meeting, and in writing a month later, to Plaintiff's invectives about his supervisors' failure to support him properly. Other examples are: (1) Dal Cerro's decision to remove Plaintiff from the *Kay/Dalton* matter after Plaintiff had written a letter to the complaining witness in the case (Judge Anello) and disclosed that there had been an internal disagreement at the OCTC over whether and when to file charges and suggesting that Plaintiff's supervisor (Steedman) had made an incorrect decision by granting the respondent an extension of time; (2) Dal Cerro's issuance of a Written Warning after Plaintiff filed the *Mendez* NDC without making the changes

his supervisor (Steedman) had instructed him to make; (3) Dal Cerro's issuance of the second Written Warning after Plaintiff failed to comply with the first Written Warning (which required him to file an amended NDC in the *Mendez* matter); (4) the decision to reassign Plaintiff to notice drafting and away from court appearances, where he, of late, had repeatedly treated both State Bar Court judges contemptuously; (5) Dal Cerro's decision to remove Plaintiff from the *Lowenstein* case after he refused to incorporate Blumenthal's changes; (6) Blumenthal's micro-management of Plaintiff's work after discovering that Plaintiff had failed to timely propound discovery in the *Bajaj* matter, had failed to comply with internally set deadlines, and was refusing to follow his supervisors' directives; (7) Dal Cerro's decision to implement a PIP so that Plaintiff could be coached back on track; (8) Dal Cerro's decision to remove Plaintiff from the *Stevens* case after he failed to comply with his supervisor's directives regarding drafts and deadlines; and (9) Dal Cerro's issuance of the Notice of Disciplinary Action, informing Plaintiff that he would be suspended for three days (to be implemented at a later date) for insubordination.[19]

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[19] In his opposition, Plaintiff does not analyze, Defendant by Defendant, whether the evidence supports a finding that each Defendant's adverse action was motivated by retaliation. Instead, he makes only very generalized arguments that various actions taken by some Defendants supports a finding that all engaged in unlawful retaliation. For example, as is discussed *infra*, Plaintiff generally asserts that the fact that Blumenthal

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Plaintiff suggests that Defendants' proffered explanations for the adverse employment actions taken against him are false and pretextual. To support this argument, Plaintiff cites very generally to the entire factual record and then more specifically, to a log maintained by Defendant Blumenthal which documented Plaintiff's activities, to Mike Nisperos' June 14, 2004, email stating his intent to terminate Plaintiff once the investigation into his RAD complaint was complete, and to Defendant Hawley's failure to conduct an impartial investigation into Plaintiff's complaints of false allegations and retaliation. (*See* Opposition at 20:5-24.) The Court finds that the record does not support Plaintiff's contention that Defendants' actions were motivated by retaliation. Plaintiff has not presented evidence that demonstrates that Defendants' proffered justifications are pretext for retaliation.

With respect to Defendant Blumenthal's log, attached to Konig's April 5, 2005, Declaration as Exhibit 17, Blumenthal's first entry was not until

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maintained a log of Plaintiff's insubordinate conduct evidences a retaliatory motive on the part of all Defendants. However, as noted in footnote 13, *supra*, to survive summary judgment on his claims against each Defendant, Plaintiff must present evidence that each Defendant's adverse action was motivated by retaliation for protected speech. *See Hansen*, 885 F.2d at 645-46 (no vicarious liability under § 1983). Defendants, for their part, also do not engage in separate analyses of motive as to each Defendant. Thus, rather than analyze this question in a manner wholly different from that employed by the parties, the Court addresses pretext in the same manner.

March 2004, and the contents of the log evidence only an attempt to document Plaintiff's insubordinate behavior. Plaintiff has presented no evidence indicating that the log was maintained in retaliation for Plaintiff's complaints to the CJP or for engaging in other protected speech or how the log supports a finding that any of Blumenthal's contemporaneous adverse actions (e.g. micro-managing Plaintiff's work) were actually motivated by retaliation. Furthermore, Plaintiff has not shown how Defendant Blumenthal's log could support a finding that Defendants Dal Cerro's or Hawley's adverse actions were motivated by retaliation. Accordingly, the Court finds that Blumenthal's log does not support a finding of pretext here.

With respect to Defendant Hawley's involvement in the investigation of the RAD complaint the Court has already found that Plaintiff has not presented any evidence that Defendant Hawley took any adverse action against him.[20] (*See* discussion *supra.*) Plaintiff must present evidence of an adverse action to survive summary judgment on his retaliation claim and with respect to Defendant Hawley, he has failed to do so. Additionally, to the extent that Plaintiff claims that the other Defendants' adverse actions against him were actually motivated by retaliation cannot find support in Defendant Hawley's conduct.

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[20] The Court has already found that Defendant Hawley's role in the RAD investigation does not, on its own, amount to an adverse action.

Thus, the Court finds that Hawley's role in the RAD investigation does not support a finding of pretext here.

With respect to Nisperos' email statement that he intended to fire Plaintiff regardless of the outcome of the RAD investigation, the Court disagrees with Plaintiff that the email is evidence of retaliatory motive. Mr. Nisperos' expressed desired to terminate Plaintiff regardless of what the investigation uncovered does not provide evidence that Plaintiff would be fired *because he filed the complaint that prompted that investigation.* Moreover, Nisperos is not a defendant here. Plaintiff has not explained how Defendants are liable for the alleged conduct and motivation of a different employee at the OCTC.

Defendants contend that they disciplined Plaintiff, changed his work assignments, imposed a PIP, and suspended him in response to his insubordination, not in retaliation for his speech. As supervisors to Plaintiff at the OCTC, Defendants had a strong interest in promoting the efficiency of the public services their office performs through its employees and in managing its employees appropriately, particularly where employee conduct hinders the efficient operation of the office. *See Connick,* 461 U.S. at 150. The PIP explained to Konig as follows:

> You have had a recurring history of performance problems related to insubordination, lack of professional detachment, and disrespect of judicial officers and other persons of authority. Additionally, you have taken

> positions in drafting legal documents and presenting matters at trial that are ill-advised and unlikely to result in positive outcomes. Finally you have not diligently performed the duties and responsibilities of your legal advisor/notice drafting assignment."

(Dal Cerro Decl., Ex. HH.) The evidentiary record before the Court does not support a finding that the reasons offered by Defendants for taking the actions they did were pretext for retaliation. (*See, e.g.*, Blumenthal Decl., Exs. C, D, G, K, N, O, P; Dal Cerro Decl., Exs. J, DD.) Plaintiff offers only generalities to support his pretext argument, claiming that because he was treated poorly around the time he submitted complaints about judicial misconduct, the events must be connected. In light of the totality of the record, as discussed above, the Court finds plaintiff has failed to marshal significant and probative evidence sufficient to avoid summary judgment. *T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987).

The Court finds, based on the totality of the evidence, that Plaintiff has not raised a triable issue of fact with respect to the motive behind Defendants' actions against Plaintiff. Plaintiff has provided no evidence to suggest that Defendants' contention that taking such adverse actions as issuing warning letters for insubordinate behavior, which followed closely on the heels of the filing of his CJP complaint, were actually taken in retaliation against Plaintiff for

engaging in protected speech. In short, Plaintiff has not shown pretext here.

Plaintiff has failed to demonstrate that there is a genuine issue of material fact regarding whether any adverse employment action Defendants took was motivated by Plaintiff's protected speech. "When evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case of unlawful discrimination or retaliation." *Hashimoto v. Dalton,* 118 F.3d 671, 680-81 (9th Cir. 1997) (citation omitted).

II. Qualified Immunity

Defendants argue that even assuming, *arguendo,* that Plaintiff had presented a genuine issue of material fact with respect to his First Amendment claim, Defendants are entitled to qualified immunity. Because the Court has found that Plaintiff has not demonstrated a triable issue of fact on his First Amendment claim, the Court need not reach Defendants' qualified immunity argument.

CONCLUSION

"In some cases, the totality of the facts may form such a clear picture that a district court would be justified in granting summary judgment, either for or against a plaintiff, on the issue of retaliatory motive." *Coszalter,* 320 F.3d at 978. Having carefully examined

the very full record in this case, the Court finds that this is one of those cases and accordingly **GRANTS** Defendants' motion for partial summary judgment on Plaintiff's first cause of action as to each Defendant.

This Order terminates docket entry no. 24. The Clerk of Court shall close the file.

IT IS SO ORDERED.

Dated: October 7, 2005 /s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN KONIG,

Plaintiff-Appellant,

v.

THE STATE BAR OF CALIFORNIA; LAWRENCE J. DAL CERRO, individually and in his capacity as Assistant Chief Trial Counsel; RUSSELL WEINER, individually and in his capacity as Deputy Chief Trial Counsel; ALLEN BLUMENTHAL, individually and in his capacity as Supervising Deputy Trial Counsel; ROBERT HAWLEY, individually and in his capacity as Deputy Executive Director,

Defendant-Appellees.

No. 05-17342

D.C. No. CV 04-2210-MJJ
Northern District of California, San Francisco

ORDER

(Filed Dec. 28, 2007)

Before: ROTH,* THOMAS, and CALLAHAN, Circuit Judges

* The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

The panel has voted to deny the petition for rehearing. Judges Thomas and Callahan voted to reject the suggestion for rehearing en banc and Judge Roth so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

CALIFORNIA CONSTITUTION
Article 12, Public Utilities

Sec. 3. Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

CALIFORNIA BUSINESS AND PROFESSIONS CODE

The State Bar Act

6001. The State Bar of California is a public corporation. It is hereinafter designated as the State Bar.

The State Bar has perpetual succession and a seal and it may sue and be sued. It may, for the purpose of carrying into effect and promoting its objectives:

(a) Make contracts.

(b) Borrow money, contract debts, issue bonds, notes and debentures and secure the payment or performance of its obligations.

(c) Own, hold, use, manage and deal in and with real and personal property.

(d) Construct, alter, maintain and repair buildings and other improvements to real property.

(e) Purchase, lease, obtain options upon, acquire by gift, bequest, devise or otherwise, any real or personal property or any interest therein.
(f) Sell, lease, exchange, convey, transfer, assign, encumber, pledge, dispose of any of its real or personal property or any interest therein, including without limitation all or any portion of its income or revenues from membership fees paid or payable by members.
(g) Do all other acts incidental to the foregoing or necessary or expedient for the administration of its affairs and the attainment of its purposes.
Pursuant to those powers enumerated in subdivisions (a) to (g), inclusive, it is recognized that the State Bar has authority to raise revenue in addition to that provided for in Section 6140 and other statutory provisions. The State Bar is empowered to raise that additional revenue by any lawful means, including, but not limited to, the creation of foundations or not-for-profit corporations.
No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with Section 11000), Division 4 (commencing with Section 16100), and Part 1 (commencing with Section 18000) and Part 2 (commencing with Section 18500) of Division 5, of Title 2 of the Government Code, shall be applicable to the State Bar, unless the Legislature expressly so declares.

6002. The members of the State Bar are all persons admitted and licensed to practice law in this State except justices and judges of courts of record during their continuance in office.

6008.1. No bond, note, debenture, evidence of indebtedness, mortgage, deed of trust, assignment, pledge, contract, lease, agreement or other contractual obligation of the State Bar shall:
(a) Create a debt or other liability of the State nor of any entity other than the State Bar (or any successor public corporation).

6008.3. The State Bar may vest in any obligee or trustee the right, in the event of default upon any obligation of the State Bar, to take possession of property of the State Bar, cause the appointment of a receiver for such property, acquire title thereto through foreclosure proceedings, and excercise such other rights and remedies as may be mutually agreed upon between the State Bar and the holder or proposed holder of any such obligation.

6010. The State Bar is governed by a board known as the board of governors of the State Bar. The board has the powers and duties conferred by this chapter.

6011. The board consists of 22 members and the President of the State Bar.

6012.5. Notwithstanding any other provision of law, beginning July 1, 1990, and every 10 years thereafter, the board shall adjust the counties included in the State Bar Districts as they existed on June 30, 1990, and shall provide for the election of attorney members of the board from those districts. The primary consideration to be employed when adjusting the counties included in the State Bar Districts shall be the development of an equitable distribution of

attorney members to governors in each district, except for the district containing rural counties such as those contained in State Bar District No. 1 as it existed on June 30, 1990.

6013.1. The attorney membership of the board is composed of:
(a) Fifteen members to be elected from the State Bar Districts created by the board pursuant to Section 6012.5.
(b) One member from the membership of the California Young Lawyers Association appointed pursuant to Section 6013.4.
This section shall become operative on July 1, 1990.

6013.4. Notwithstanding any other provision of law, one member of the board shall be elected by the board of directors of the California Young Lawyers Association, from the membership of that association. Such member shall serve for a term of one year, commencing at the conclusion of the annual meeting next succeeding the election and is eligible for reelection. A vacancy shall be filled by election in the manner provided herein for the unexpired term.

6025. Subject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out of this chapter.

6029. The board may appoint such committees, officers and employees as it deems necessary or proper, and fix and pay salaries and necessary expenses.

6030. The board shall be charged with the executive function of the State Bar and the enforcement of the provisions of this chapter.

CALIFORNIA GOVERNMENT CODE

Title 1, Division 3.6, Part 3
Claims Against Public Entities

900.2. "Board" means:
(a) In the case of a local public entity, the governing body of the local public entity.
(b) In the case of the state, except as provided by subdivision (c), the Victim Compensation and Government Claims Board.
(c) In the case of a judicial branch entity or judge of one of those entities, the Judicial Council.

900.3. A "judicial branch entity" is a public entity and means any superior court, court of appeals, the Supreme Court, the Judicial Council, or the Administrative Office of the Courts.

900.4. "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State.

900.6. "State" means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

Title 1, Division 3.6, Part 4
Actions Against Public Entities and Public Employees

940.2. "Board" means:
(a) In the case of a local public entity, the governing body of the local public entity.
(b) In the case of the state, except as provided by subdivision (c), the Victim Compensation and Government Claims Board.
(c) In the case of a judicial branch entity or a judge thereof, the Judicial Council.

940.3. A "judicial branch entity" is a public entity and means any superior court, court of appeals, the Supreme Court, the Judicial Council, or the Administrative Office of the Courts.

940.4. "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State.

940.6. "State" means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

955.4 Except as provided in Sections 811.9, 955.6, 955.8, and 955.9:
(a) Service of summons in all actions on claims against the state shall be made on the Attorney General.
(b) The Attorney General shall defend all actions on claims against the state.

960.5. The Attorney General, until he is relieved of further responsibility in the manner provided in Section 960.4, or until the matter has been reduced to final judgment, shall have the duty to defend such public agency by taking whatever steps he considers appropriate or necessary. The Attorney General, until he is so relieved of further responsibility, shall have full authority to bind the public agency by stipulation or admission.

The Attorney General may delegate his responsibility hereunder in any particular case, to any county counsel or district attorney willing to accept such delegation. When such responsibility has been delegated, the district attorney or county counsel, as the case may be, shall have the same power and authority with reference to the matter as is hereinabove provided for the Attorney General.

All costs and expenses, without limitation, of the Attorney General or district attorney or county counsel, pursuant to this chapter shall be a charge against the public agency in whose behalf he appears.

Title 1, Division 3.6, Part 5
Payment of Claims and Judgments

965. (a) Upon the allowance by the Victim Compensation and Government Claims Board of all or part of a claim for which the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists, and the execution and presentation of documents the board may require which discharge the state of all liability under the claim, the board shall designate the fund from which the claim is to be paid and the state agency concerned

shall pay the claim from that fund. If there is no sufficient appropriation for the payment available, the board shall report to the Legislature in accordance with Section 912.8. Claims arising out of the activities of the State Department of Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists.

(b) Notwithstanding subdivision (a), if there is no sufficient appropriation for the payment of claims, settlements, or judgments against the state arising from an action in which the state is represented by the Attorney General, the Attorney General shall report the claims, settlements, and judgments to the Chairperson of either the Senate Committee on Appropriations or the Assembly Committee on Budget, who shall cause to be introduced legislation appropriating funds for the payment of the claims, settlements, or judgments.

970. As used in this article:

(b) "Judgment" means a final judgment for the payment of money rendered against a local public entity.

(c) "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the Regents of the University of California and does not include the state or any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

970.2. A local public entity shall pay any judgment in the manner provided in this article. A writ of mandate is an appropriate remedy to compel a local public entity to perform any act required by this article.

Title 1, Division 4, Chap. 10
Local Public Employee Organizations
(Meyers-Milias-Brown Act)

3501(c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

Title 1, Division 4, Chap. 10.3
State Employer-Employee Relations
(Dills Act)

3512. It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public

employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.

Title 1, Division 7
Miscellaneous

6585(f). "Local agency" means a party to the agreement creating the authority, or an agency or subdivision of that party, sponsoring a project of public capital improvements, or any city, county, city and county, authority, district, or public corporation of this state.

Title 2, Division 2, Part 1
Legislature

9149.20. This article shall be known and may be cited as the Whistleblower Protection Act.

Title 2, Division 3, Part 1
State Departments and Agencies

11340. The Legislature finds and declares as follows:
(a) There has been an unprecedented growth in the number of administrative regulations in recent years.
(b) The language of many regulations is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account. The language is often confusing to the persons who must comply with the regulations.
(c) Substantial time and public funds have been spent in adopting regulations, the necessity for which has not been established.
(d) The imposition of prescriptive standards upon private persons and entities through regulations where the establishment of performance standards could reasonably be expected to produce the same result has placed an unnecessary burden on California citizens and discouraged innovation, research, and development of improved means of achieving desirable social goals.
(e) There exists no central office in state government with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute, and are consistent with other law.
(f) Correcting the problems that have been caused by the unprecedented growth of regulations in California requires the direct involvement of the Legislature as well as that of the executive branch of state government.
(g) The complexity and lack of clarity in many regulations put small businesses, which do not have

the resources to hire experts to assist them, at a distinct disadvantage.

11340.1. (a) The Legislature therefore declares that it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations.

Title 2, Division 5, Part 2
State Civil Service

18500. It is the purpose of this part:
(a) To facilitate the operation of Article VII of the Constitution.
(b) To promote and increase economy and efficiency in the state service.
(c) To provide a comprehensive personnel system for the state civil service, in which: (1) Positions involving comparable duties and responsibilities are similarly classified and compensated.
(2) Appointments are based upon merit and fitness ascertained through practical and competitive examination.
(3) State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service insofar as consistent with the best interests of the state.
(4) The rights and interests of the state civil service employee are given consideration insofar as consistent with the best interests of the state.
(5) Applicants and employees are treated in an equitable manner without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, age, sexual

orientation, disability, political or religious opinions or nonjob-related factors.
(6) Tenure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds.

Title 5, Division 2, Part 1
Powers and Duties Common to
Cities, Counties, and Other Agencies

53227.2. For purposes of this article, the following definitions apply:
(a) "Local agency" means a city, city and county, county, district, municipal or public corporation, political subdivision, or other public agency of the state.

53820. As used in this article, "local agency" means county, city, regional park district, school district, community college district, or any other municipal or public corporation or district.

54706. As used in this chapter, "legislative body" means the city council or board of trustees in the case of a city, the board of supervisors in the case of a county or a city and county, or the board of directors, trustees, or governors or other governing body in the case of a special district or any other municipal or public corporation or district.

Title 8
The Organization and Government of Courts

68701. As used in this chapter, "commission" means the Commission on Judicial Performance provided for in Section 8 of Article VI of the Constitution, "masters" means special masters appointed by the Supreme Court pursuant to rules adopted by the Judicial Council, and "judge" means a judge who is the subject of an investigation or proceeding under Section 18 of Article VI of the Constitution.

CALIFORNIA LABOR CODE

Division 2, Part 3, Chap. 5
Political Affiliations

1102.5. (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
(c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a

violation or noncompliance with a state or federal rule or regulation.

(d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

CASES GRANTING ELEVENTH AMENDMENT IMMUNITY TO BAR

Lupert v. State Bar, 761 F.2d 1325 (9th Cir. 1985)

Giannini v. Real, 711 F.Supp. 992 (C.D.Cal. 1989)

Ramos v. Committee of Bar Examiners, 857 F.Supp. 702 (N.D.Cal. 1994)

Hirsh v. Justices of the Supreme Court, 67 F.3d 708 (9th Cir. 1995)

In re: Light, 1996 U.S. App. LEXIS 16575 (9th Cir. 1996)

Wolfgram v. State Bar, 1996 U.S. App. LEXIS 17562 (9th Cir. 1996)

Ramos v. Committee of Bar Examiners, 1996 U.S. App. LEXIS 19919 (9th Cir. 1996)

Wu v. State Bar, 953 F.Supp. 315 (C.D.Cal. 1997)

Williams v. State Bar, 1998 U.S. Dist. LEXIS 10516 (N.D.Cal.)

Phillips v. State Bar, 1999 U.S. App. LEXIS 22882 (9th Cir. 1999)

Phillips v. State Bar, 2000 U.S. App. LEXIS 9578 (9th Cir. 2000)

Melek v. State Bar, 2000 U.S. App. LEXIS 21696 (9th Cir. 2000)

In re: Berg, 26 Fed.Appx. 648 (9th Cir. 2001)

In re: Franceschi, Jr., 43 Fed.Appx. 87 (9th Cir. 2002)

Taggart v. State Bar, 57 Fed.Appx. 757 (9th Cir. 2003)

Petty v. Petty, 2003 U.S. Dist. LEXIS 9035 (N.D.Cal.)

Torres v. State Bar, 143 Fed.Appx. 13 (9th Cir. 2005)

Torres v. State Bar, 181 Fed.Appx. 672 (9th Cir. 2006)

Allegrino v. State Bar, 2007 U.S. Dist. LEXIS 40155 (N.D.Cal.)

Khanna v. State Bar, 505 F.Supp.2d 633 (N.D.Cal. 2007)